No. 02-5636 Status: DECIDED
Title: Robert Kaupp, Petitioner
v.
Texas

Docketed: August 5, 2002
Lower Ct: Court of Appeals of Texas, Fourteenth District (14-00-00128-CR)

Date	Proceedings and Orders
Jul 18 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 4, 2002)
Sep 19 2002	DISTRIBUTED for Conference of October 11, 2002
Nov 22 2002	Response requested.
Dec 20 2002	Brief of respondent Texas in opposition filed.
Jan 2 2003	REDISTRIBUTED for Conference of January 17, 2003
Jan 21 2003	REDISTRIBUTED for Conference of January 24, 2003
Feb 14 2003	REDISTRIBUTED for Conference of February 21, 2003
Feb 24 2003	REDISTRIBUTED for Conference of February 28, 2003
Mar 3 2003	REDISTRIBUTED for Conference of March 7, 2003
Mar 17 2003	REDISTRIBUTED for Conference of March 21, 2003
Mar 24 2003	REDISTRIBUTED for Conference of March 28, 2003
Mar 31 2003	REDISTRIBUTED for Conference of April 4, 2003
Apr 14 2003	REDISTRIBUTED for Conference of April 18, 2003
Apr 21 2003	REDISTRIBUTED for Conference of April 25, 2003
Apr 28 2003	REDISTRIBUTED for Conference of May 2, 2003
May 5 2003	Petition GRANTED. Judgment VACATED and case REMANDED Opinion per curiam. (Detached opinion.)
	**********
Jun 4 2003	MANDATE ISSUED.

Name	Address	Phone
Attorneys for Petitioner:		
Jimmy Phillips Jr.	P.O. Box 29 Angleton, TX 77516-0029	
Party name: Robert Kaupp		
Attorneys for Respondent:		
Donald W. Rogers Jr.	Harris County District Atty 1201 Franklin Street, Ste. 600 Houston, TX 77002	7137555826
Party name: Texas		

02 5636

Supreme Court, U.S.
FILED
JUL 18 2002
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

ROBERT JUSTIN KAUPP, Appellant §
§
VS. §
§ NO. _____
THE STATE OF TEXAS, Appellee §
§

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS FOR TEXAS
AND
THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS

TRIAL COURT CAUSE NO. 803792

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

AUG 5 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Jimmy Phillips, Jr.
P. O. Drawer 29
Angleton, Texas 77516-0029
SBN 15953000
Attorney for Appellant
Robert Justin Kaupp

July 11th, 2002

181 pp

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Petitioner has previously been granted leave to proceed in forma pauperis in the District Court of Harris County, in his appeal to the Texas appellate courts, and a record was furnished at no cost to him.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Respectively Submitted this 11 day of July, 2002,

Jimmy Phillips Jr.
Attorney for Appellant
Robert Justin Kaupp
P. O. Drawer 29
Angleton, Texas 77516-0029
AC 979 849-8511 (Angleton)
Fax # AC 409 849-1409
Bar Card #15953000
Admitted: United States Supreme Court, May 17th, 1971

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, ROBERT J. KAUPP, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A
Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 50.00	$ N/A	$ 50.00	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child Support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ N/A	$ 0	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public-assistance (such as welfare)	$ 0	$ N/A	$ 0	$ N/A
Other (specify): College Scholarship	$ 0	$ N/A	$ ~~297~~ 74.25	$ N/A
Total monthly income:	$ 50.00	$ N/A	$ ~~347~~ 124.25	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 10.00	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ N/A
Life	$ 0	$ N/A
Health	$ 0	$ N/A
Motor Vehicle	$ 0	$ N/A
Other: _____	$ 0	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ N/A
Installment payments		
Motor Vehicle	$ 0	$ N/A
Credit card(s)	$ 0	$ N/A
Department store(s)	$ 0	$ N/A
Other: _____	$ 0	$ N/A
Alimony, maintenance, and support paid to others	$ 0	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ N/A
Other (specify): _____	$ 0	$ N/A
Total monthly expenses:	$ 10.00	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ N/A
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
~~[illegible]~~ TDCJ	Trust Fund	$ Less than $100.00	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 30.00	$ N/A
Clothing	$ 10.00	$ N/A
Laundry and dry-cleaning	$ 0	$ N/A
Medical and dental expenses	$ 9.00	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☒ Yes ☐ No

If yes, how much? My father paid $5,000.00.

If yes, state the attorney's name, address, and telephone number:

Jimmy Phillips, Jr.
P. O. Drawer 29
Angleton, Texas 77516-0029
979 849-8511

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am in the Texas Department of Corrections serving my prison sentence.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June the seventeenth, 2002

Robert Justin Kaupp
(Signature)

THE STATE OF TEXAS *

COUNTY OF BRAZORIA *

BEFORE ME, the undersigned authority, on this day personally appeared ROBERT JUSTIN KAUPP and who being by me duly sworn, upon his oath, states that he has read the foregoing AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and that the statements and allegations contained in that instrument are true and correct.

Robert Justin Kaupp
ROBERT JUSTIN KAUPP

SWORN TO AND SUBSCRIBED BEFORE ME by the said ROBERT JUSTIN KAUPP on this the _____ day of _____, 2002, to certify which witness my hand and seal of office.

_____
Notary Public In and For
The State of Texas

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JUSTIN KAUPP, Appellant	§	
	§	
VS.	§	
	§	NO. _____
THE STATE OF TEXAS, Appellee	§	
	§	

PROOF OF SERVICE

I, Jimmy Phillips Jr., as attorney for the Defendant, Robert Justin Kaupp, do swear or declare that on this 11 day of July, 2002, as required by Supreme Court Rule 29, that I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each party to the abo ve proceeding or that party's counsel, and on every other person required to be served, by deposition an envelope containing the abo ve documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses are as follows:

APPELLEE

THE STATE OF TEXAS

COUNSEL FOR APPELLEE

CALVIN HARTMAN
Harris County District Attorney's Office
Houston, Texas 77002

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of July, 2002.

Jimmy Phillips Jr.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JUSTIN KAUPP, Appellant	§	
	§	
VS.	§	
	§	NO. _____
THE STATE OF TEXAS, Appellee	§	
	§	

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS FOR TEXAS
AND
THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS

TRIAL COURT CAUSE NO. 803792

PETITION FOR WRIT OF CERTIORARI

Jimmy Phillips, Jr.
P. O. Drawer 29
Angleton, Texas 77516-0029
SBN 15953000
Attorney for Appellant
Robert Justin Kaupp

July, 2002

QUESTION PRESENTED:

The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution.

LIST OF PARTIES:

All Parties appear in the caption of the case on the cover page.

APPELLANT

ROBERT JUSTIN KAUPP

COUNSEL FOR APPELLANT

Jimmy Phillips, Jr.
P. O. Drawer 29
Angleton, Texas 77516-0029
SBN15953000

APPELLEE

THE STATE OF TEXAS

COUNSEL FOR APPELLEE

CALVIN HARTMAN
Harris County District Attorney's Office
Houston, Texas 77002

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectively prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix-A and is unpublished. The opinion of the Court of Criminal Appeals, denying the motion for discretionary review appears at Appendix-B and is a post card notice of their action.

JURISDICTION

The date on which the highest state court decided the appeal of Robert Justin Kaupp was the 1st day of May, 2002, and a copy of the notice appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States

Fifth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

At 3:00 o'clock A. M. Henry Kaupp and his wife were asleep in their bedroom. Their 17 year old son was asleep in his room in the family home. While the family was sleeping,

believing that they were free from intruders in the safety of their home. The police were massing outside. They had been refused an arrest warrant but decided to try to get the Defendant Robert Kaupp in custody and attempt to get him to confess to a murder they were investigating. Six police cars along with a large number of officers arrived at the Kaupp home and stationed themselves around the house in various locations. Three officers went to the front door.

Henry Kaupp and his wife were awakened from their peaceful sleep by a loud knocking at the front door. As he opened the door, he was asked if his son was at home. When he turned to go to his son's bedroom to see, three officers, two detectives and one uniformed police officer brushed past him and went directly into the Defendant's room.

Upon entering the room, the officers shined a flashlight on the Defendant and one of them grabbed the Defendant, pulling him from the bed where he was sleeping and began handcuffing him. While this was going on, one of the officers stated "We need to talk". The Defendant responded with one word, "O.K." He was taken to a patrol car where he was locked inside until he was transported to the police station. The Defendant was never allowed to put on any clothes or shoes. His parents consent for his removal from the family home and the family unit was never asked for, nor was it given.

The Defendant remained in the locked car while the police searched the house where he was taken into custody. They then left with the Defendant and on the way to the station, detoured so that the Defendant could see where they were recovering the decomposed body of the murder victim. They then went to the police station where after a short time of interrogation, the Defendant signed a confession.

It was generally accepted at the trial, that if the detention of the Defendant was not

with the Decedent's consent, the confession would be inadmissable under the "fruit of the poisonous tree" doctrine. The Prosecutor maintained that the detention was lawful because the Defendant "consented" to the detention. It was further contended that the consent was shown by the utterance of the word "O.K." and the fact that the Defendant did not resist the police officers intrusion and taking of him into custody.

REASONS FOR GRANTING THE PETITION

Issue Presented:

The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution.

Argument and Authorities under Issue Presented:

As occurred in the case of Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664 (1982) the Defendant objected to the admission of his confession at his trial. He argued that his warrantless arrest was not supported by probable cause, that he had been involuntarily transported to the police station, and that the confession must be suppressed as the fruit of this illegal arrest. The trial court overruled this objection, and petitioner was convicted.

Upon hearing before the Supreme Court, the opinion delivered in Taylor v. Alabama, stated:

> "In *Brown v. Illinois, supra*, and *Dunaway v. New York, supra*, the police arrested suspects without probable cause. The suspects were transported to police headquarters, advised of their *Miranda* rights, and interrogated. They confessed ***690** within two hours of their arrest. This ****2667** Court held that the confessions were not admissible at trial, reasoning that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is " 'sufficiently an act of free will to purge the primary taint.' " *Brown v. Illinois, supra*, at 602, 95 S.Ct., at 2261 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963)). See also *Dunaway v. New York, supra*, at 217, 99 S.Ct., at 2259. This Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and, particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois, supra*, at 603-604, 95 S.Ct., at 2261 (citations and footnote omitted); *Dunaway v. New York*, 442 U.S., at 218, 99 S.Ct., at 2259. The State bears the burden of proving that a confession is admissible. *Ibid.*
>
> In *Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. See *Dunaway v. New York, supra*, at 217, 99 S.Ct., at 2259. The reason for this approach is clear: "[t]he exclusionary rule, ... when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth" Amendment. *Brown v. Illinois*, 422 U.S., at 601, 95 S.Ct., at 2260. If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere " 'form of words.' " *Id.*, at 603, 95 S.Ct., at 2261 (quoting *Mapp v. Ohio*, 367 U.S. 643, 648, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081 (1961)).
>
> This case is a virtual replica of both *Brown* and *Dunaway*. ***691** Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event." Taylor vs. Alabama, supra.

It is undisputed that the police could not obtain an arrest warrant on the facts available to them, but decided to obtain custody of the defendant at 3:00 a.m. in the morning. Their purpose was to intimidate and confuse the defendant. Were it otherwise, they would not have needed such a large number of police officers and automobiles. It was necessarily a "show of force". In order to justify the detention of the Defendant, the State of Texas contended that the detention was with the Defendant's consent. Setting aside for the moment of the effect of the statement "O.K.", there is no evidence of consent except the silence of the defendant, and the failure to resist and fight against the restraint of the officers as he was being taken in his bedclothes to the locked patrol car. Neither silence nor the failure to fight a uniformed police officer can be said to constitute any kind of agreement to waive one's constitutional rights. To hold otherwise would only increase the difficulty and dangerousness of making lawful arrests. The only possible evidence of constitutional waiver therefore was the response of "Okay." to the question or statement "Robert, we have to talk".

Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. United States v. U.S. District Court, Eastern District, Michigan, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). The Fourth Amendment draws a firm line at the entrance to the house. Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

The waiver of the Fourth Amendment's rights is not a waiver to be taken lightly. The purpose of the Fourth Amendment to the United States Constitution is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. Berger v. New York, 388 U.S. 41, 53, 87 S.Ct. 1873, 1880, 18 L.Ed.2d 1040 (1967);

This rule is subject to only a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 517, 19 L.Ed.2d 576 (1976); One of the specifically established exceptions to the requirements of both a warrant and probable cause is consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). Thus, the Fourth Amendment may be waived by an individual who consents to the police conduct.

When relying upon consent to justify the lawfulness of a search, the State has the burden to prove by clear and convincing evidence that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968); This burden requires the State to show that the consent was positive and unequivocal, and there was no duress or coercion. The burden cannot be discharged by showing mere acquiescence in a claim of lawful authority. Bumper, 391 U.S. at 548-549, 88 S.Ct. at 1791-1792; The consent required for a search and the consent to go with police officers, as with any police-citizen encounter is based on the same constitutional provisions and must be shown by clear and convincing evidence. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

In order to meet this burden, and taking the evidence in its best light, the state was only able to introduce the following:

1. When the defendant was awakened by a flashlight in his home at 3:00 a.m. the officer said "Robert we need to go talk". The reply of the defendant was "O.K."(V6, pg11) Appendix E;
2. The defendant did not resist the handcuffs being placed on him.(V6, pg 50-51) Appendix F;

3. The defendant did not struggle with officers when he was immediately taken from his home and locked in the patrol car.(V6, pg 50-51) Appendix F;
4. The defendant did not resist the arrest. (V4, pg 119) Appendix G;
5. The defendant knew that they were the police.(V6, pg 50-51) Appendix F;

Reasons 2, 3, 4 and 5, without more, cannot by any stretch of the imagination be considered to be indications of a person giving positive and unequivocal consent. They are only indicative of acquiescence to a claim of lawful authority. All officers were unanimous in their testimony that had the defendant resisted at any time from the point they were placing handcuffs on him, the defendant would have been guilty of an assault on a police officer or resisting arrest. Such action on the defendant's part would have turned the illegal detention into a lawful arrest for the crime committed in the law officer's presence.

Neither is the brief conversation proof of consent to custody by "clear and convincing evidence". It was a command and a response of submission to that command. At no time did the officers communicate to the defendant verbally or by their actions show anything that would allow a reasonable person to feel free to disregard the police and go about his business. Specifically:

1. No one told the defendant that he could talk to his parents., nor did they allow him to speak with his parent as he was removed handcuffed to a locked patrol car outside. (V4, pg 23) Appendix H;
2. No one told the defendant that they were going to handcuff him, or that they were taking him to the police department. (V4, pg 175) Appendix I;

3. No one told the defendant that he had any choice about what they were doing to him. (V6, pg 50-51) Appendix F;

4. No one told defendant he had a right to refuse to go with them. (V6, pg 50-51) Appendix F;

5. There was an extreme showing of force because of the number of police officers and the number of patrol cars present.

There not having been any arrest warrant issued for the defendant, and no exception to an arrest having been raised by the evidence, the detention and custody of the defendant was illegal and in violation of the Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment to the United State Constitution. The confession of the defendant should have been excluded by the trial and the appellate court.

The court of appeals in reviewing the record before it concluded:

> "With respect to the first and third scenarios outlined in *Dowthitt*, the State contends that appellant voluntarily consented to accompany law enforcement officers to the station in furtherance of their investigation. If the circumstances show that a person is being transported only upon the invitation, request, or even urging of the police, and there are no threats, express or implied, that he will be taken forcibly, the accompaniment is voluntary, and that person is not then in custody. *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex.Crim.App.1985). The test for whether a citizen's encounter with a law enforcement officer is consensual is whether "a reasonable person would feel free 'to disregard the police and go about his business.' " *Hunter v. State*, 955 S.W.2d 102, 104 (Tex.Crim.App.1997) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991)). On the morning of January 27, after being allowed into appellant's house by his father and led to appellant's bedroom, Detective Pinkins identified himself to appellant and told him they "need to go and talk," to which appellant replied "Okay." Although Pinkins's weapon was visible, neither he nor any of the other officers had their guns drawn. There was no evidence of any threat, either express or implied, that appellant would be forcibly taken to the station for questioning. In fact, no other conversation took place between any of the

> officers and appellant, and none of the officers even approached appellant until after he had responded to Pinkins. At the time appellant responded, we conclude that a reasonable person in appellant's situation would have felt free to say "no" or otherwise to disregard Detective Pinkins and go about his business. *See Hunter*, 955 S.W.2d at 104. Instead, by saying "Okay," appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning."

The opinion of the court of appeals is flawed in several areas. (1) The conclusion that a reasonable person who is handcuffed, not allowed to clothe himself, and is placed in a locked patrol car will feel free to leave, is untenable. (2) To say that there was no show of force or intimidation to indicate that the Defendant was being taken forcibly when the defendant was attended by 6 officers and several police cars parked outside his home stretches the imagination. (3) To find that the defendant consented because he did not "resist the use of handcuffs or act in a manner consistent with anything other than full cooperation with the law enforcement officers transporting him, is contra to the proposition that the burden of showing waiver, i.e. consent, cannot be discharged by showing mere acquiescence in a claim of lawful authority. Bumper, 391 U.S. at 548-549. (4) The fact that the Defendant has other conversations at the police station prior to the invasion of his home does not demonstrate that he consented on that occasion. (5) There is nothing in the conversation between the Detective and the Defendant which allows a reasonable person to infer where the conversation cannot take place, or that it was necessary for him to be immediately transported in his bedclothes to the police station.

In reaching their opinion, the Texas Court indicated that they used the following test to determine the issue of consent:

> We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S .W.2d 816, 818 (Tex.App.--Houston [14th Dist.] 1996, pet. ref'd).

In using this test and In reaching its decision, the Court of Appeals erred by failing to require that the evidence be "clear and convincing" and not based on speculation. As Stated in Michigan v. Jackson, 106 S.Ct. 1404 (1986) :

> "Almost a half century ago, in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464, 58 S.Ct., at 1023. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer v. Williams,* 430 U.S., at 404, 97 S.Ct., at 1242. Doubts must be resolved in favor of protecting the constitutional claim."

Had the Court of Appeals applied the proper test concerning the consent of the Defendant for to the sudden detention by the officers, the conviction of the Defendant would have been reversed and a new trial ordered. Their failure to follow the applicable constitutional law deprived the defendant of his constitutional rights and entitles him to have this court correct the error committed.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Court of Appeals (14th Dist.) should be reversed. Further, the confession of the Defendant should be held inadmissable as a product of the illegal detention of the Defendant. The case should be remanded to the State of Texas for further proceedings consistent with this court's opinion.

Respectively Submitted this 11 day of July, 2002,

Jimmy Phillips Jr.

Attorney for Appellant
Robert Justin Kaupp
P. O. Drawer 29
Angleton, Texas 77516-0029
AC 979 849-8511 (Angleton)
Fax # AC 409 849-1409
Bar Card #15953000
Admitted: United States Supreme Court, May 17th, 1971

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JUSTIN KAUPP, Appellant	§	
	§	
VS.	§	
	§	NO. _____
THE STATE OF TEXAS, Appellee	§	
	§	

PROOF OF SERVICE

I, Jimmy Phillips Jr., as attorney for the Defendant, Robert Justin Kaupp, do swear or declare that on this 11th day of July, 2002, as required by Supreme Court Rule 29, that I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the abo ve proceeding or that party's counsel, and on every other person required to be served, by deposition an envelope containing the abo ve documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses are as follows:

APPELLEE

THE STATE OF TEXAS

COUNSEL FOR APPELLEE

CALVIN HARTMAN
Harris County District Attorney's Office
Houston, Texas 77002

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of July, 2002.

Jimmy Phillips Jr.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

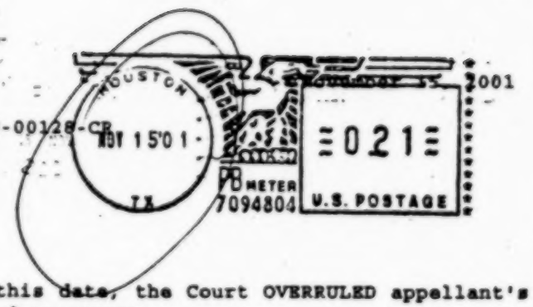
May 1, 2002
COA#: 14-00-00128-CR
RE: Case No. 0095-02
STYLE: KAUPP, ROBERT JUSTIN
On this day, the Appellant's Petition for Discretionary Review has been refused.

Troy C. Bennett, Jr., Clerk

JIMMY PHILLIPS JR
P O DRAWER 29
ANGLETON TX 77516

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

OFFICIAL BU...
STATE OF TEXAS
STATE PENALT...



Styl... Kaupp, Robert Justin
v. The State of Texas

No. 14-00-00128-CR

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

T. C. Case # 803,792

Ed Wells, Clerk

Jimmy Phillips, Jr.
P. O. Drawer 29
Angleton, TX 77516-0029

01

JUNE 7, 2001.

JUDGMENT

The Fourteenth Court of Appeals

ROBERT JUSTIN KAUPP, Appellant

NO. 14-00-00128-CR V.

THE STATE OF TEXAS, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

JUN - 8

Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00128-CR

ROBERT JUSTIN KAUPP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 803792

OPINION

Over his plea of not guilty, appellant, Robert Justin Kaupp, was found guilty of murder. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). The jury assessed appellant's punishment at fifty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant complains that (1) his confession was the result of an illegal arrest, and therefore should not have been admitted into evidence; (2) his confession was inadmissible because it was obtained in violation of a state statute regarding enticement of a minor child; and (3) the State's jury argument improperly speculated on matters that were not introduced into evidence. We affirm.

FACTUAL BACKGROUND

Fourteen-year-old Destiny Thetford, the complainant, disappeared on January 13, 1999. In the course of its investigation, the Harris County Sheriff's Department learned that Nicholas Thetford, the complainant's 19-year-old half-brother, had a sexual relationship with the complainant, and that Thetford and appellant were together on the day the complainant disappeared. On January 26, both Thetford and appellant came to the sheriff's department offices. Appellant was cooperative and allowed to leave; Thetford, however, was interviewed at length and given a polygraph examination, which he failed (his third such failure). Thetford eventually admitted to stabbing the complainant and placing her body in a drainage ditch. Additionally, Thetford implicated appellant as having participated in the stabbing and hiding of the complainant's body.

Immediately after obtaining a written statement from Thetford, detectives attempted but were unable to obtain a warrant for appellant's arrest. Detective Gregory Pinkins testified that he nevertheless decided at that point to "get [appellant] in and confront him with what Thetford had said." Pinkins testified that he, two other plain clothes detectives, and three uniformed officers went to appellant's home, where they arrived between 2:00-3:00 in the morning of January 27. Pinkins knocked on the front door, and appellant's father answered and led Pinkins, Detective Larry Davis, and two of the officers to appellant's bedroom. Using his flashlight, Pinkins found appellant lying on a mattress on the floor. According to both Pinkins and Davis, Pinkins identified himself to appellant and told him that "we need to go and talk," to which appellant responded "Okay." The two officers then went into the room and handcuffed appellant. Appellant was escorted from the house in his boxer shorts and a T-shirt and placed into a patrol car.

Sometime after appellant was placed in the patrol car, the detectives learned that the

complainant's body had been found. Appellant was taken directly from his home to the scene where the body was located. According to Pinkins, this was done to let appellant know that Thetford had given them the information to locate the body. They stayed at this location for approximately five to ten minutes before proceeding to the sheriff's department.

Appellant was eventually transported to the Lockwood Substation, where he was taken to an interview room and his handcuffs were removed. Appellant initially denied any involvement in the complainant's disappearance, but later admitted that he was involved, although he never admitted to causing any fatal wound or actually confessed to the offense of murder. Appellant's statement was accepted, typed up, and given to appellant to read. Appellant acknowledged his rights on the statement, initialed that he understood and wished to waive the same, and signed the statement.

I.

Appellant's Motion to Suppress

In appellant's first point of error, he complains that the trial court erred in denying his motion to suppress and admitting his confession into evidence. Appellant moved to suppress all written or oral statements made by appellant, including the statement he signed the morning of January 27. Following a hearing, the trial court denied appellant's motion. We do not disturb a trial court's ruling on a motion to suppress unless the trial court abused its discretion. *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Appellant claims that his confession was the result of an illegal arrest, and therefore inadmissable. In its findings of fact and conclusions of law, the trial court concluded that appellant was not placed under arrest prior to his admission that he was involved in the

complainant's disappearance. Because we find no error in this conclusion, we conclude that appellant's confession was not inadmissible as the product of an illegal arrest.

Appellant contends he was arrested without a warrant when he was handcuffed in his bedroom the morning of January 27, placed into a patrol car, and transported to the sheriff's department and interrogated. Under the Code of Criminal Procedure, a person is arrested when "he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977). A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The determination of custody is based entirely on objective circumstances. *Id.* The Court of Criminal Appeals has outlined four general situations which may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way,
>
> (2) when a law enforcement officer tells the suspect that he cannot leave,
>
> (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and
>
> (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.[1]

Id. at 255. The determination of custody must be made on a case-by-case or ad hoc basis after consideration of all of the objective circumstances. *Id.*

It is undisputed appellant was never told that he could not leave, nor was he told that there was probable cause to arrest him. With respect to the first and third scenarios outlined

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[1] With respect to this fourth situation, *Dowthitt* further requires that the officers' knowledge of probable cause be manifested to the suspect. *Id.* at 255.

in *Dowthitt*, the State contends that appellant voluntarily consented to accompany law enforcement officers to the station in furtherance of their investigation. If the circumstances show that a person is being transported only upon the invitation, request, or even urging of the po'ice, and there are no threats, express or implied, that he will be taken forcibly, the accompaniment is voluntary, and that person is not then in custody. *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex. Crim. App. 1985). The test for whether a citizen's encounter with a law enforcement officer is consensual is whether "a reasonable person would feel free 'to disregard the police and go about his business.'" *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991)). The trial court must look at the totality of the circumstances surrounding a statement of consent to determine if that consent was voluntary. *Lackey v. State*, 638 S.W.2d 439, 447 (Tex. Crim. App. 1982).

The testimony adduced at the hearing on appellant's motion for suppress revealed that, prior to the morning of January 27, the following events had occurred:

- appellant had met Detective Pinkins previously in connection with the investigation into the complainant's disappearance;
- on at least two previous occasions, appellant voluntarily went to the sheriff's department to answer questions and take a polygraph examination in connection with the investigation;
- on both prior occasions, appellant was allowed to leave the sheriff's department and was given no reason to believe that he was a suspect in the investigation;
- on one of those occasions, appellant had been placed in handcuffs before being transported in a patrol car, and the handcuffs were removed once appellant arrived at the station;
- appellant had never been questioned in connection with the investigation at any location other than the sheriff's department.

On the morning of January 27, after being allowed into appellant's house by his father and led to appellant's bedroom, Detective Pinkins identified himself to appellant and

told him they "need to go and talk," to which appellant replied "Okay." Although Pinkins's weapon was visible, neither he nor any of the other officers had their guns drawn. There was no evidence of any threat, either express or implied, that appellant would be forcibly taken to the station for questioning. In fact, no other conversation took place between any of the officers and appellant, and none of the officers even approached appellant until after he had responded to Pinkins. At the time appellant responded, we conclude that a reasonable person in appellant's situation would have felt free to say "no" or otherwise to disregard Detective Pinkins and go about his business. *See Hunter*, 955 S.W.2d at 104. Instead, by saying "Okay," appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning.[2]

Appellant contends that he was placed into custody when he was handcuffed and placed into a patrol car. However, there is no bright-line test providing that mere handcuffing is always the equivalent of an arrest. *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997). Several of the State's witnesses testified that individuals are routinely handcuffed for safety purposes before being transported in a patrol car. Significantly, the testimony showed that when appellant voluntarily went to the sheriff's department in a patrol car just the day before, he was placed in handcuffs before getting in the car, and the handcuffs were removed at the station. Given appellant's consent to accompany Detective Pinkins to the station for questioning, and given his familiarity with the transport procedures, we find that a reasonable person in appellant's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement. Furthermore, appellant did not resist the use of handcuffs or act in a manner consistent with

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[2] At the suppression hearing, appellant disputed that any conversation took place between Pinkins and himself before he was placed in handcuffs. However, we afford almost total deference to the trial court's determination of the historical facts that the record supports, especially when the court's fact findings are based on an evaluation of witness credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

anything other than full cooperation with the law enforcement officers transporting him.[3]

Accordingly, we find that the trial court did not err in concluding that appellant had not been arrested before he admitted his involvement in the complainant's death. Appellant's first point of error is overruled.[4]

II.

Enticing a Child

In point of error number two, appellant complains the trial court erred in admitting his confession into evidence because the confession was obtained after law enforcement officers took appellant from his parents' possession in violation of section 25.04 of the Penal Code.[5] Appellant contends that because his confession was obtained in violation of section 25.04, the trial court was required to suppress it pursuant to article 38.23 of the Texas Code of Criminal Procedure.[6]

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[3] Appellant asserts that the fact he was taken outside his home wearing only a T-shirt and boxer shorts, with no shoes, is indicative of an arrest rather than a voluntary accompaniment. Appellant presented no evidence, however, that he ever requested an opportunity to dress or that he otherwise complained about his attire during the time he was transported to the police station.

[4] We recognize that this case must be narrowly construed based on the unique facts presented. We express no opinion concerning the outcome of a situation involving similar circumstances, but where the individual had no previous interaction with the police department and its investigative procedures.

[5] Section 25.04, titled "Enticing a Child," states in part:

> A person commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of the parent or guardian of such child. [TEX. PEN. CODE ANN. § 25.04(a) (Vernon Supp. 2001).]

At the time of the alleged offense, appellant was 17 years old.

[6] Article 38.23 states, in relevant part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence against the accused on the trial of any criminal case. [TEX. CODE CRIM. PROC. ANN. art. 38.23(a)

To preserve error, the complaining party must first afford the trial court an opportunity to rule on the specific complaint. *Meyers v. State*, 865 S.W.2d 523, 524 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *see* TEX. R. EVID. 103(a) (stating that error may not be predicated upon the trial court's admission of evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection"). The purpose of requiring a timely and specific objection is to allow the trial court the opportunity to make a determination and ruling on the objection and then to proceed with the trial under the proper procedural and substantive manners, as appropriately corrected by the trial court. *Janecka v. State*, 823 S.W.2d 232, 243-44 (Tex. Crim. App. 1992) (op. on reh'g).

In this case, appellant never asserted section 25.04 or article 38.23 as a basis of his objection in the trial court. Appellant failed to raise this argument in his written motion to suppress or at any point during the pretrial hearing on that motion. At trial, appellant's counsel asserted the following objection to the introduction of appellant's written confession:

> We would object to the introduction of State's Exhibit No. 2 for all the reasons previously stated, both at the pretrial hearing and during the trial of this case. Additionally, we would object that the consent of the parents was not gained in order to waive the substantial legal rights enumerated on the front page of the confession. . . . Those would be the objections to the confession, that it was not free and voluntary.

Appellant's objection is not sufficiently specific to make the trial court aware appellant was asserting that his confession was obtained in contravention of section 25.04 of the Penal Code, and thus should have been suppressed pursuant to article 38.23(a) of the Texas Code of Criminal Procedure. *See* TEX. R. APP. P. 33.1(a). Because appellant's trial objection does not comport with his argument on appeal, appellant has failed to preserve error on this issue. *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996). An

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(Vernon Supp. 2001).]

argument on appeal that does not comport with the trial objection presents nothing for review. *Coffey v. State*, 796 S.W.2d 175, 180 (Tex. Crim. App. 1990).

Because appellant's objection at trial did not preserve error, appellant's second point of error is overruled.

III.

Improper Jury Argument

In his third point of error, appellant asserts the trial court erred in overruling his objections to what he claims was improper jury argument by the State. To be proper, jury argument must fall within one of four categories: (1) summary of the evidence, (2) reasonable deduction from the evidence, (3) response to argument of opposing counsel, and (4) plea for law enforcement. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Appellant complains the prosecutor impermissibly called on the jury to speculate about the content of Nicholas Thetford's confession, which was not admitted as evidence. We find that the State's jury argument was proper as a response to the argument of appellant's counsel.

During the cross-examination of Detective Larry Davis, appellant's counsel attempted to impeach Davis with testimony he had given at the pretrial hearing on appellant's motion to suppress. Specifically, appellant's counsel introduced Davis's testimony that while questioning appellant the morning of January 27, Davis provided appellant with information that Nicholas Thetford had given him, such as appellant being at the scene, Thetford taking the complainant outside the house, and then Thetford stabbing the complainant before handing the knife to appellant. Before Davis was called as a witness at trial, Thetford himself testified and gave his account of the events surrounding the complainant's death.

During jury argument, appellant's counsel made the following argument with respect to his client's confession:

> I want you to read it carefully when you go back there. And when you do, you will see that it is consistent with the first confession that Nicholas Thetford gave.

Appellant's counsel then again read Davis's testimony from the pretrial hearing to the jury and stated:

> Nicholas Thetford confessed and said: I handed my knife to Robert Kaupp. Now, he's telling you something different about the knives and all kinds of stories.

In rebuttal, the prosecutor made the following argument, which serves as the basis for appellant's third point of error:

> Also, something real, real important that you need to think about. Nick Thetford gave both a written and a videotape confession. If he says what Davis said he said, they would show you this confession.
>
> . . . .
>
> That's right. It's not submitted to the jury because Davis was confused in that big loose-leaf looking transcript they had of the pretrial hearing. Davis got confused on one issue and they would like you to believe that was Nick Thetford's confession. If that was Nick Thetford's confession, Nick Thetford's confession would have been submitted into evidence as a prior inconsistent statement.
>
> . . . .
>
> Nick's videotaped confession where he said something different than he said on the stand would have been admitted. On their effective cross-examination – or perhaps it was on my direct. I forget which – Davis got confused on one point and they would like you to believe that is Nick Thetford's confession. It's not. That's just Davis reciting what he thought were some investigative techniques. And if he got the facts mixed up, shame on Davis, but that's not Nick Thetford's confession. Nick Thetford's confession is not evidence. They didn't offer it into evidence because it is not consistent –
>
> . . . .
>
> I can't introduce a prior consistent statement. They can introduce a prior inconsistent statement.

Viewed in context, it is clear that the prosecutor was merely responding to appellant's counsel's suggestion that Thetford had given police a confession that was inconsistent with his trial testimony regarding appellant's role in the murder. Hence, appellant's counsel opened the door to a response by the prosecution that if Thetford's confession was truly inconsistent with his testimony at trial, the confession could have been used by appellant's counsel to impeach Thetford on the stand. *See* TEX. R. EVID. 613. Argument in response to and invited by opposing counsel does not constitute reversible error even though it refers to a matter not in evidence. *Miller v. State*, 479 S.W.2d 670, 672 (Tex. Crim. App. 1972). We overrule appellant's third point of error.

The judgment below is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Yates, Fowler, and Lee[7].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Justice Norman Lee sitting by assignment.

CAUSE NO. 803,792

THE STATE OF TEXAS — IN THE 262ND JUDICIAL

VS. — DISTRICT COURT OF

ROBERT KAUPP — HARRIS COUNTY, TEXAS

COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW
REGARDING ADMISSIBILITY OF STATEMENT

On November 12 and 17, 1999, came to be heard Defendant's Motion to Suppress Statements. Present at the hearing before this Honorable Court were the Defendant, Robert Kaupp; Defense Counsel, Jimmy Phillips, Jr. And Katherine Scardino, and Prosecutor Vic Wisner. The Court, having heard the evidence in the above captioned case and having observed the demeanor of the witnesses and the manner in which each testified, and having asessed their credibility and the weight to be accorded their testimony, makes the following findings of fact and conclusions of law based on the totality of the circumstances presented.

FINDINGS OF FACT

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

1. The Complainant, Destiny Thetford, fourteen years of age, was reported missing in the early morning hours of January 14, 1999. On that date Harris County Sheriff's Department Deputies, responding to the report, interviewed the Defendant, Robert Kaupp, among others, at the Thetford residence located at 16006 Leigh Canyon Road, Harris County, Texas. The Defendant was cooperative with law enforcement on that date and continued to ostensibly assist the search for Destiny Thetford for the next two weeks.

2. The Defendant voluntarily traveled to the Harris County Sheriff's Department Homicide Division on Monday, January 25, 1999 in the company of Nicholaus Thetford's father. The defendant agreed to speak with the Sheriff's Department Homicide Detective Fred Barnes, and other investigators on that date regarding his possible knowledge of the facts surrounding Destiny Thetford's disappearance. The Defendant dictated a voluntary statement (SX-1) on that date and then proofread and signed same. The Defendant also consented to, and was administered, a polygraph examination on that date. The defendant was

informed that he had passed the polygraph examination and was then released.

3. On Tuesday, January 26, 1999, Detective Fred Barnes went to the Thetford residence on Leigh Canyon, his purpose to request that both the Defendant and Nicholaus Thetford, both of whom were present at the residence, accompany him back to the Homicide Division for further questioning in conjunction with the aforementioned investigation. Nicholaus Thetford had previously admitted to an unlawful, incestuous, sexual relationship with Destiny Thetford, had failed two polygraphs and was believed by investigators to possess information regarding the whereabouts of Destiny Thetford. The Defendant had given inconsistent information regarding the last time he had seen Destiny Thetford and the investigation needed to clarify that issue. Both individuals agreed to voluntarily accompany Barnes to the Lockwood offices. Barnes requested the assistance of a marked Sheriff's Department vehicle to transport these individuals. Both were handcuffed for safety purposes while being transported to Lockwood. Neither was under arrest.

4. While at the Lockwood offices on January 26, 1999, the Defendant dictated a second statement (DX-1) to Sheriff's Department investigators to clarify the above referenced matter. On both SX-1 and DX-1 the Defendant admitted to being in the company of Nicholaus Thetford during the late evening hours of January 13, 1999. After the completion of DX-1, the Defendant was allowed to leave and was transported home by his mother. Nicholaus Thetford was further interviewed with the assistance of FBI agents and later his father, Robert Thetford. In the early morning hours of January 27, 1999 Nicholaus Thetford signed a written confession admitting to killing Destiny Thetford in a field behind his house during the evening of January 13, 1999. He also stated that he placed her body in a sewer pipe which ran under his house and opened into the field. Thetford stated in his confession that Robert Kaupp had helped him kill Destiny Thetford and that both had used knives to cut her throat.

5. At the time of Nicholaus Thetford's confession, Sheriff's Department Investigators had no corroborating evidence nor motive to indicate that the Defendant had participated in killing Destiny Thetford. Sheriff's Detectives decided to attempt to question the Defendant as to his possible involvement as a suspect or witness in the ongoing investigation. Fred Barnes called the District Attorney's Office Intake Division at approximately 2:00 a.m. on January 27, 1999 and was told that he could not obtain a probable cause or "pocket" warrant to place the Defendant in custody for further questioning. He was further advised by the District Attorney's Office to see if Robert Kaupp would voluntarily talk to them. Sheriff's Department investigators then assembled a large group of officers, both uniform and plain clothes, for the dual purposes of attempting to recover the body of Destiny Thetford and locating and attempting to interview the Defendant. Investigators believed the Defendant was spending the night at the Thetford residence.

6. Sheriff's Department personnel arrived at the Thetford residence at approximately 3:00 a.m. on January 27, 1999. Detectives Barnes, Pinkins, and Davis accompanied by uniformed deputies attempted to locate the Defendant. After being unsuccessful in locating the Defendant at the Thetford residence these investigators then went to the Kaupp residence located nearby at 5218 Shady Oaks Lane, Friendswood, Harris County, Texas.

7. Detective Pinkins knocked at the door of the Defendant's residence which was opened by the Defendant's father, Henry Kaupp. Henry Kaupp allowed the Sheriff's Department personnel into his home. Detective Pinkins told Henry Kaupp that he needed to speak with his son, Robert. Henry Kaupp was unaware if the Defendant was in the residence in that the Defendant sometimes stayed the night at friends' homes. Likewise, Henry Kaupp believed his son was not criminally responsible for Destiny Thetford's disappearance. Henry Kaupp led investigators to the Defendant's bedroom and opened the door for investigators. The Defendant was awakened and told by Detective Pinkins that they "needed to talk." The Defendant was unaware at this time that Nicholaus Thetford had confessed and implicated him in this offense. The Defendant replied "Okay," indicating he understood that he was to be questioned again at the Sheriff's Department Lockwood offices. The Defendant was handcuffed by Deputy Calhoun. Calhoun mistakenly believed that the Defendant was under arrest, but this fact was never manifested to the Defendant. Other Sheriff's Department personnel allowed the handcuffing as a safety procedure in transporting a witness under the circumstances.

8. The Defendant was not questioned nor read his rights at his residence. During his transportation to Lockwood the Defendant was driven by the search location near the Thetford residence so that detectives could demonstrate to the Defendant that they were on the verge of recovering Destiny Thetford's body.

At the Lockwood offices, the Defendant was read his

rights by Detective Pinkins. He stated that he understood and waived those rights and agreed to talk to the detectives. After being confronted with Thetford's confession and the fact that Destiny Thetford's body had been recovered, the defendant told investigstors he would tell them the "truth." The Defendant then began detailing to Detective Pinkins and Davis the eventual contents of SX-2. The Defendant was never threatened, harmed, or coerced by Detectives into his admission or his dictating and then signing SX-2. The Defendant was allowed a chance to read SX-2 and did so before signing same, freely and voluntarily. The Defendant's claim of being beaten by Detective Davis as well as his rendition of the earlier events of January 27, 1999 are not credible. The Defendant's claims that he did not dictate or voluntarily sign SX-2 are also not credible.

10. The testimony of Henry Kaupp describing the entry of the detectives as brushing by him without his consent is incredible due to the totality of the testimony and the ongoing relationship that existed at the time between the Kaupps and law enforcement.

11. The testimony of Tamara Kaupp regarding the events that took place at the time detectives entered her home and had her sign a consent to search is incredible taken in the light of the ongoing circumstances existing between her family and law enforcement.

CONCLUSIONS OF LAW

The initial statement made by the Defendant on January 25, 1999 (SX-1) was given freely and voluntarily at a time when the Defendant was not in custody. This statement is admissible as an admission by a party opponent under Rule 801 of the Texas Rules of Criminal Evidence in regard to the Defendant's admission of being in the presence of both Nicholaus and Destiny Thetford in the evening hours of January 13, 1999. Additionally, the Defendant's denial of any complicity in Destiny Thetford's disappearance is admissible as evidence of consciousness of guilt.

The third statement given by the Defendant (SX-2) was given freely and voluntarily by the Defendant on January 27, 1999. There was no coercion, threats, violence nor promise made to the Defendant in exchange for his agreeing to give said statement. The statement complies in every manner with Art. 38.22 of the Texas Code of Criminal Procedure. Further, the taking of said statement did not violate the Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United states Constitution and Art. 1, Sec. 10 of the Texas Constitution. The Defendant was not placed under arrest prior to his admissions against penal interest made just prior to the taking of the written statement marked (SX-2).

The above findings of fact and conclusions of law are hereby fiied this 18th day of January, 2000 A.D.

The Honorable Mike Anderson,
Judge, 262nd District Court

FILED
CHARLES BACARISSE
District Clerk
JAN 10 2000
Time: 10
Harris County, Texas
By _____ Deputy

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
DEC 10 2001
ED WELLS
CLERK

TO THE

COURT OF CRIMINAL APPEALS

ROBERT JUSTIN KAUPP, Appellant §
§
VS. §
§ **NO. _____**
THE STATE OF TEXAS, Appellee §
§

ON PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

AFFIRMING THE CONVICTION IN THE 262ND DISTRICT COURT OF HARRIS COUNTY, TEXAS AT HOUSTON, TEXAS TRIAL COURT CAUSE NO. 803792

PETITION FOR DISCRETIONARY REVIEW

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June, 2000

Oral Argument Requested

TO THE TEXAS COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS:

CERTIFICATE OF PARTIES

APPELLANT

ROBERT JUSTIN KAUPP

COUNSEL FOR APPELLANT

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APPELLEE

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COUNSEL FOR APPELLEE

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that he be allowed to present an oral argument to the court regarding the issues presented.

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW ROBERT JUSTIN KAUPP, the Appellant herein, and respectfully petitions this Honorable Court to review the decision of the Court of Appeals, Fourteenth Supreme Judicial District of Texas, at Houston, affirming the trial court's judgement.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. One of the issues presented by appellant is one of first impression. Does a law enforcement officer, without effecting an arrest, have the right to take a minor child (under the age of 18) out of the possession of the minor's parents without the parents permission. The removal of minor children from their parents by the state is a issue of constitutional dimensions.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

The Defendant was removed from his parents home at 3:00 a.m. in the morning after the law enforcement officers woke him in his bedroom. The State agreed that an arrest would have been illegal, but claimed that the Defendant voluntarily gave his consent to go handcuffed with the officers to the police station. His parents did not give consent for his removal from their custody and possession. At the police station, after signing a confession, the defendant was charged with murder. He was then taken to a magistrate for the first time. An indictment for murder was presented against him to which he plead "not guilty". After a motion to suppress was denied, he was tried before a jury. The jury found the defendant guilty of murder and assessed his punishment at fifty-five years. The defendant duly gave notice of appeal.

PROCEDURAL HISTORY

1) The Fourteenth Court of Appeals issued an Opinion on July 5, 2001.

2) A Motion for Rehearing was timely filed on August 14th, 2001, after the court granted a motion to extend time for filing.

3) On November 15, 2001 the Motion for Rehearing was denied.

STATEMENT OF APPELLANT'S REASONS FOR REVIEW

REASON FOR REVIEW ISSUE NUMBER ONE:

The appellate court erred in overruling appellant's first point of error and in holding that the simple statement of "OK" was a knowing and intelligent waiver of the appellant's right not be handcuffed and transported to the police station for the purpose of securing a statement from him by way of a confession. The confession was the result of an illegal detention in custody and inadmissable under the constitution of the United States and the State of Texas and the laws of the State of Texas.

REASON FOR REVIEW ISSUE NUMBER TWO:

The appellate court did not discuss Appellant's point of error concerning the failure to obtain Appellant's parents consent before removing him from their possession. His removal resulted in a violation of the Texas Family Code. The Court of Appeals further erred in holding that the issue had not been raised in the trial court. This issue is an issue of first impression: Can a minor be removed from his parents possession without a warrant for arrest or other due process of law, even if he consents to the removal.

REASON FOR REVIEW ISSUE NUMBER THREE:

The holding of the Court of Appeals that the argument of the state which was admittedly outside of the record was "invited error" and therefore proper was a misapplication of the law. The initial argument of appellant's counsel was based on evidence before the jury. The excuse of "invited error" does not apply when the subject of the argument was in evidence before the jury. The holding of the Court of Appeals is contrary to other decisions of other Court's of Appeal and The Court Of Criminal Appeals. The opinion creates conflicting opinions which need to be resolved by this court.

REASON FOR REVIEW ISSUE NUMBER ONE

A. STATEMENT:

> The appellate court erred in overruling appellant's first point of error and in holding that the simple statement of "OK" was a knowing and intelligent waiver of the appellant's right not be handcuffed and transported to the police station for the purpose of securing a statement from him by way of a confession. the confession was the result of an illegal detention in custody and inadmissable under the constitution of the United States and the State of Texas and the laws of the State of Texas.

B. FACTUAL SUMMARY:

Police officers burst into the Defendant's private bedroom at his parents' home at 3:00 a.m., handcuffed him and removed him from his and his parents' home without shoes and wearing only his sleeping clothes (underwear and t-shirt). The only conversation was "We need to talk" and the response from the defendant was "OK". There was no indication to the defendant that he would be taken to the police station in a patrol car, or would be removed from his parents' home and the possession of his parents, or even that he had a right to refuse to go and talk. Additionally, there was a substantial show of law enforcement authority which was intended to cause him to yield to that authority.

C. ARGUMENT:

To summarize the holding of the Court of Appeals concerning the consent of the Appellant himself to accompany the officers to the police station for questioning:

1) Appellant's response of "OK" to the detective's statement as he flipped on the light at 3:00 a.m. "Robert, we need to talk", was sufficient as evidence of consent based on the totality of the circumstances; i.e. his previous two encounters with the officers where he was handcuffed and taken to the police station and released.

2) Appellant did not ask that he be allowed to dress before he was removed from his bedroom.

The court went on to state that there is no "bright line test providing that mere handcuffing

is always the equivalent of an arrest". Citing Rhodes v. State, 955 SW2d 115 (Tex. Crim. App 1997). In reviewing the Rhodes decision the court of appeals erred in that none of the reasons relied on in that case were present in the instant case. To the contrary, it is undisputed that the police officers knew about the co-defendants's confession implicated the Appellant and that the Appellant did not know about the confession. He was the target of the investigation at that time. (Volume 3, p 174 - Appendix 2) It was the officers intent not to merely question the Appellant, but to arrive in mass and arouse the Appellant from his sleep in such a manner as to cause confusion, fright, and surprise.(Volume 3, p 174 - Appendix 2) In Dowthitt v. State, 931 S.W.2d 244, 254 (Tex.Crim.App.1996) this court held:

> "A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. Stansbury v. California, 511 U.S. 318- —, 114 S.Ct. 1526, 1528-1530, 128 L.Ed.2d 293, 298-299 (1994). The "reasonable person" standard presupposes an innocent person. Florida v. Bostick, 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) (emphasis in original). Moreover, the subjective intent of law enforcement officials to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect. Stansbury v. California, 511 U.S. at —, 114 S.Ct. at 1530, 128 L.Ed.2d at 300. United States v. Mendenhall, 446 U.S. 544, 554 n. 6, 100 S.Ct. 1870, 1877 n. 6, 64 L.Ed.2d 497 (1980)(opinion of Stewart, J.). See also Dancy v. State, 728 S.W.2d 772, 778 (Tex.Crim.App.), cert. denied, 484 U.S. 975, 108 S.Ct. 485, 98 L.Ed.2d 484 (1987).

There was no evidence introduced which would indicate that a reasonable person in the circumstances of the defendant **would not have believed** that he was under arrest and simply yielded to the authority of the police officers.

One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search or seizure that is conducted pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). Thus, the

Fourth Amendment may be waived by an individual consenting to a search. Kolb, 532 S.W.2d at 89; Paprskar v. State, 484 S.W.2d 731, 737 (Tex.Crim.App.1972). When relying upon consent to justify the lawfulness of a search, the State has the burden to prove by clear and convincing evidence that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968); see also Paprskar, 484 S.W.2d at 737. This burden requires the State to show that the consent was positive and unequivocal, and there was no duress or coercion. Juarez, 758 S.W.2d at 775. The burden cannot be discharged by showing mere acquiescence in a claim of lawful authority. Bumper, 391 U.S. at 548-549, 88 S.Ct. at 1791-1792; Paulus v. State, 633 S.W.2d 827, 850 (Tex.Crim.App.1981). The consent required for a search and the consent to go with police officers, as with any police-citizen encounter, is based on the same constitutional provisions and must be shown by clear and convincing evidence. A police-citizen encounter is considered consensual if a reasonable person would feel free to disregard the police and go about his business. Hunter v. State, 955 S.W.2d 102, 104 (Tex.Crim.App.1997).

Several officers testified that had the Appellant resisted being placed in handcuffs or being taken out of the house, they would have filed a criminal charge against him of resisting arrest.(Volume 4 - Page 120 - Appendix 3) It is undisputed that without valid consent, the detention of the appellant was illegal and the confession inadmissable. There was a total failure to present evidence that the Appellant gave knowing and informed consent to be handcuffed and removed to the police station.

The custody of the defendant was illegal and in violation of the Fourteenth and the Fourth Amendment to the United States Constitution, in violation of Article I, Sec. 9 of the

Texas Constitution, and in violation of Tex. Code Crim. Proc. Ann. Article 38.23(Vernon Supp. 1989). The confession of the defendant should have been excluded from the jury's consideration.

REASON FOR REVIEW ISSUE NUMBER TWO

A. STATEMENT

The appellate court did not discuss Appellant's point of error concerning the failure to obtain Appellant's parents consent before removing him from their possession. His removal resulted in a violation of the Texas Family Code. The Court of Appeals further erred in holding that the issue had not been raised in the trial court. This issue is an issue of first impression: Can a minor be removed from his parents possession without a warrant for arrest or other due process of law, even if he consents to the removal.

B. FACTUAL SUMMARY

The defendant was seventeen years of age in November of 1999. The law enforcement officers appeared at his parents home at 3:00 a.m. on November 27th, 1999. They entered the home after waking his parents. The officers went to his bedroom, handcuffed him, and removed him from his home and his parents possession. The officers had no authorization for their actions. They claimed that he consented to his removal in spite of the fact that he was not an adult and was incompetent to give such consent.

As a result of the unlawful possession, the officers were able to obtain a confession from the defendant.

C. ARGUMENT:

It is undisputed that the officers did not have an arrest warrant for the defendant and that no exception for arrest without a warrant existed. In fact the officers had already been refused an arrest warrant before they went to the Appellant's home. If they had authority to arrest, they would have had the authority to maintain the possession of the minor

defendant. Since the defendant had not reached majority, he was still under the control of his parents and in their custody. His removal was in Violation of the Texas Family Code.

This ground of error was brought to the attention of the trial court on at least three occasions:

1) At the conclusion of the motion to suppress, the appellant made the following objection "The Family Code of Texas says that a person is a minor until he reaches the age of 18 years or graduates from high school. I know that our Penal Code says that a person can be arrested for a felony as adult at the age of 17. Without a warrant those officers had no authority to take this man, young man, boy, 17 years old out of his house. I submit to this Court that was also a violation under a family code statute that tells us he's still a minor. He has no authority to sign anything. Out laws say he can't sign anything., They have to have the permission of his parents." Suppression Hearing, Volume 3, Page 21, l.1-l.12

2) During the trial the objection was made when the law enforcement officer testified that he did not obtain the consent of the parents to remove the Appellant from the parents' possession and out of their home without a warrant:

   Mr. Phillips: "We would object to any proceedings with this defendant, who is 17 years of age, as the detectives not having received legal consent of (or) any waiver of his rights as is granted by his parents solely, under 151.003 of the Texas Family Code." (Volume 3, Pg. 189, ln 11-17)

   The Court: "Al right. That objection will be overruled."

3) The next trial day, at the beginning of the trial, the following occurred:

   Mr. Phillips: "We were outside the presence of the jury yesterday and I assume we got all of it on the record. The Court overruled my objection to anything that went on after he was taken into either voluntary or involuntary custody, as the case may be, from the home of his parents, as being in violation of 151.003, Subparagraph 7 of the Texas Family Code, the parents not having consented to it. The Court overruled that objection outside the presence of the jury.
   My next question to the Court is whether or not I need to keep making that objection every time a question is asked or if I can have a running objection to the entire course of events when he was taken into the station."

   The Court: "You can have a running objection as to that theory regarding his parents not being consulted under that provision of the Family Code.

I will grant you a running objection on that issue." (Volume 7, Page 58-60 - Appendix 4)

The Court of Appeals refused to consider the Appellant's point of error that his custody by the law enforcement officers was illegal and in violation of the Texas Family Code, because the Appellant failed to preserve error with a timely objection. Meyers v State, 865 S.W.2d 523,524 (Tex. App. - Houston [14th] 1993, Pet. Ref'd)

In order for an objection to preserve error, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the court is in a proper position to do something about it. Montoya v State, 43 S.W.3rd 568 (Tex. App. - Waco 2001); This was done. Tex. Code Crim. Proc. Ann. , Article 38.23 provides that any evidence obtained in violation of a Texas Statute is excluded and not admissible during the trial or at any other hearing. Article 25.04 of the Texas Penal Code makes it a criminal offense to interfere with the lawful possession of a minor who is in the possession and control of that minor's parents. The attorney for the state agreed that the officers received no consent pursuant to the Family Code from the Appellant's parents and that he was 17 years old. (Volume 4, Pg 148 ln. 25 - Pg 150, ln. 9)

Additionally, the interference by the State in the family relationship is a wrong of Constitutional magnitude. In Stanley, the U. S. Supreme court wrote:

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '(r)ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the

> **1213 state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S., at 541, 62 S.Ct., at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) " Stanley v. Illinois, 92 S.Ct. 1208 (U.S.Ill. 1972. - April 3, 1972)

And in Quillion:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e. g., Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); Stanley v. Illinois, supra ; Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state **555 can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). And it is now firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974)". Quilloin v. Walcott, 98 S.Ct. 549 (U. S. Supreme Court - 1978)

Article 38.23 does not require that the law of this state which is violated be a criminal statute. The violation of the Texas Family Code satisfies the requirements of 38.23 which triggers the prohibition of the use of the evidence obtained (the confession of the Appellant, in this case).

The conviction should be set aside and an new trial ordered. At the very least, the Appellant is entitled to have the Court of Appeals consider and rule on the error which was preserved and briefed by the Appellant.

REASON FOR REVIEW ISSUE NUMBER THREE

A. STATEMENT

The holding of the Court of Appeals that the argument of the state which was admittedly outside of the record was "invited error" and therefore proper was a

misapplication of the law. The initial argument of appellant's counsel was based on evidence before the jury. The excuse of "invited error" does not apply when the subject of the argument was in evidence before the jury. The holding of the Court of Appeals is contrary to other decisions of other Court's of Appeal and The Court Of Criminal Appeals. The opinion creates conflicting opinions which need to be resolved by this court.

B. FACTUAL SUMMARY

During the prosecutor's argument to the jury, the following occurred:

Prosecutor Argument:

"Also something real, real important that you need to think about. Nick Thetford gave both a written and a videotape confession. If he says what Davis said he said, they would show you this confession.

MS. SCARDINO: Judge, object to any argument by the prosecutor on evidence that has not been admitted in front of the jury.

THE COURT: Overruled. This is argument.

MR. WISNER: That's right. It's not admitted the jury because Davis was confused in that big loose-leaf looking transcript they had of the pretrial hearing. Davis got confused on one issue and they would like you to believe that was Nick Thetford's confession. If that was Nick Thetford's confession, Nick Thetford's confession would have been submitted into evidence as a prior inconsistent statement.

Nick's videotape confession –

MR. PHILLIPS: Object to argument outside the record causing the jury to speculate on matters not in evidence.

THE COURT: Overruled.

MR. WISNER: Nick's videotaped confession where he said something different than he said on the stand would have been admitted. On their effective cross-examination – or perhaps it was on my direct. I forget which – Davis got confused on one point and they would like you to believe that is Nick Thetford's confession. It's not. That's just Davis reciting what he thought were some investigative techniques. And if he got mixed up, shame on Davis, but that's not Nick Thetford's confession. Nick Thetford's confession is not evidence. They didn't offer it into evidence because is not consistent –

MR. PHILLIPS: Judge, I would object at this time and ask the jury to be retired.

THE COURT: Overruled.

MR. PHILLIPS: Object to the comments of the prosecutor challenging the defendant and also his comments on matters which are not in evidence. And it is a comment on failure of the defendant to introduce evidence, which the State had equal opportunity to get into.

THE COURT: Overruled? Mr. Wisner?

MR. WISNER: I can't introduce a prior consistent statement. They can introduce a prior inconsistent statement....." (V7, pg 58-60)

In its opinion, the Court of Appeals overruled the point of error stating that the argument of the State outside of the record was **"invited argument"**. This holding is in conflict with other Court of Appeal decisions which hold that the invited argument rule does not protect statements outside of the record when the argument is based on the evidence.

C. ARGUMENT:

"Generally, the principal purpose of jury argument is to assist the jury in analyzing th evidence and in arriving. at a just and reasonable conclusion based only on the evidence. Dickinson v. State, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984). However, jury argument made in answer to opposing counsel's argument is permissible. See Wilson v State, 938 S.W.2d 57,59 (Tex. Crim. App. 1996) Goff v. State, 931 S.W.2d 537, 547-48 (Tex. Crim. App. 1996) The "invited argument" rule permits prosecutorial argument outside the record in response to the defense argument which goes outside the record. Johnson v. State, 611 S.W.2d 649, 650 (Tex. Crim. App. [Panel Opinion] 1981) Tucker v. State, 15 S.W.3d 229, 237 (Tex. App. –Houston [14th Dist.] 2000, pet. Ref'd). A prosecutor's comments may not, however stray beyond the scope of the invitation." Aschbacher v. Sate, 2001 WL 884248 (Tex. App. –San Antonio 2001)

And see other cases in accord that: Invited-argument rule does not protect statements that go outside the record in response to argument based on evidence. Hollingsworth v. State, 15 S.W.3d 586 (Tex. App. - Austin 2000); The "invited argument" rule applies when the prompting argument of the defense counsel goes outside the record. Wilson v. State, 938 S.W.2d 57, 60 (Tex. Crim. App. 1996); Fant-Caughman v. State, 2001 WL 194852 (Tex. App. - Amarillo 2001).

The argument of the defendant's attorney came directly from the evidence when he read from the testimony of Detective Davis which was in evidence in front of the jury as is noted on page 10 of the Court of Appeals's opinion. Since the argument was based on the evidence and the record before the jury, the argument of the state's attorney outside of the record and without any factual evidentiary basis is totally improper.

In the case relied on by the Court of Appeals, Miller v. State, 479 S.W.2d 670, 672, the closing argument by appellant's counsel attached the expertise of a Lieutenant Day and complained that the state had not produced blown-up pictures of the prints to display to the jury. It was not based on the evidence before the jury and was a call on the states's attorney to respond to why "he had not blown up pictures". The Miller decision did not in any way diminish or change the legal proposition that **the invited argument rule cannot be applied to an argument which is based on evidence and the record before the jury**.

The argument of the state, which was outside of the record, called on the jury to speculate on matters which were not in evidence, and was extremely harmful to the theories of the defendant presented in evidence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant requests that this Court grant her petition for discretionary review. Following the grant of review, Appellant prays that the judgment of the Court of Appeals be reversed and that the case be remanded to the trial court for a new trial.

Respectfully submitted,

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CIRTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of Appellant's Brief was mailed to by certified mail, return receipt requested to Calvin Hartman, Harris County District Attorney's Office, Attorney for the State, of on this the 10th day of December _____, 2004.

JIMMY PHILLIPS, JR.
ATTORNEY FOR APPELLANT
ROBERT JUSTIN KAUPP

Appendix 1

JUNE 7, 2001.

JUDGMENT

The Fourteenth Court of Appeals

ROBERT JUSTIN KAUPP, Appellant

NO. 14-00-00128-CR V.

THE STATE OF TEXAS, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

B 2001

Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00128-CR

ROBERT JUSTIN KAUPP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 803792

OPINION

Over his plea of not guilty, appellant, Robert Justin Kaupp, was found guilty of murder. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). The jury assessed appellant's punishment at fifty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant complains that (1) his confession was the result of an illegal arrest, and therefore should not have been admitted into evidence; (2) his confession was inadmissible because it was obtained in violation of a state statute regarding enticement of a minor child; and (3) the State's jury argument improperly speculated on matters that were not introduced into evidence. We affirm.

FACTUAL BACKGROUND

Fourteen-year-old Destiny Thetford, the complainant, disappeared on January 13, 1999. In the course of its investigation, the Harris County Sheriff's Department learned that Nicholas Thetford, the complainant's 19-year-old half-brother, had a sexual relationship with the complainant, and that Thetford and appellant were together on the day the complainant disappeared. On January 26, both Thetford and appellant came to the sheriff's department offices. Appellant was cooperative and allowed to leave; Thetford, however, was interviewed at length and given a polygraph examination, which he failed (his third such failure). Thetford eventually admitted to stabbing the complainant and placing her body in a drainage ditch. Additionally, Thetford implicated appellant as having participated in the stabbing and hiding of the complainant's body.

Immediately after obtaining a written statement from Thetford, detectives attempted but were unable to obtain a warrant for appellant's arrest. Detective Gregory Pinkins testified that he nevertheless decided at that point to "get [appellant] in and confront him with what Thetford had said." Pinkins testified that he, two other plain clothes detectives, and three uniformed officers went to appellant's home, where they arrived between 2:00-3:00 in the morning of January 27. Pinkins knocked on the front door, and appellant's father answered and led Pinkins, Detective Larry Davis, and two of the officers to appellant's bedroom. Using his flashlight, Pinkins found appellant lying on a mattress on the floor. According to both Pinkins and Davis, Pinkins identified himself to appellant and told him that "we need to go and talk," to which appellant responded "Okay." The two officers then went into the room and handcuffed appellant. Appellant was escorted from the house in his boxer shorts and a T-shirt and placed into a patrol car.

Sometime after appellant was placed in the patrol car, the detectives learned that the

complainant's body had been found. Appellant was taken directly from his home to the scene where the body was located. According to Pinkins, this was done to let appellant know that Thetford had given them the information to locate the body. They stayed at this location for approximately five to ten minutes before proceeding to the sheriff's department.

Appellant was eventually transported to the Lockwood Substation, where he was taken to an interview room and his handcuffs were removed. Appellant initially denied any involvement in the complainant's disappearance, but later admitted that he was involved, although he never admitted to causing any fatal wound or actually confessed to the offense of murder. Appellant's statement was accepted, typed up, and given to appellant to read. Appellant acknowledged his rights on the statement, initialed that he understood and wished to waive the same, and signed the statement.

I.

Appellant's Motion to Suppress

In appellant's first point of error, he complains that the trial court erred in denying his motion to suppress and admitting his confession into evidence. Appellant moved to suppress all written or oral statements made by appellant, including the statement he signed the morning of January 27. Following a hearing, the trial court denied appellant's motion. We do not disturb a trial court's ruling on a motion to suppress unless the trial court abused its discretion. *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Appellant claims that his confession was the result of an illegal arrest, and therefore inadmissable. In its findings of fact and conclusions of law, the trial court concluded that appellant was not placed under arrest prior to his admission that he was involved in the

complainant's disappearance. Because we find no error in this conclusion, we conclude that appellant's confession was not inadmissible as the product of an illegal arrest.

Appellant contends he was arrested without a warrant when he was handcuffed in his bedroom the morning of January 27, placed into a patrol car, and transported to the sheriff's department and interrogated. Under the Code of Criminal Procedure, a person is arrested when "he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977). A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The determination of custody is based entirely on objective circumstances. *Id.* The Court of Criminal Appeals has outlined four general situations which may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way,
>
> (2) when a law enforcement officer tells the suspect that he cannot leave,
>
> (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and
>
> (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.[1]

Id. at 255. The determination of custody must be made on a case-by-case or ad hoc basis after consideration of all of the objective circumstances. *Id.*

It is undisputed appellant was never told that he could not leave, nor was he told that there was probable cause to arrest him. With respect to the first and third scenarios outlined

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[1] With respect to this fourth situation, *Dowthitt* further requires that the officers' knowledge of probable cause be manifested to the suspect. *Id.* at 255.

in *Dowthitt*, the State contends that appellant voluntarily consented to accompany law enforcement officers to the station in furtherance of their investigation. If the circumstances show that a person is being transported only upon the invitation, request, or even urging of the police, and there are no threats, express or implied, that he will be taken forcibly, the accompaniment is voluntary, and that person is not then in custody. *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex. Crim. App. 1985). The test for whether a citizen's encounter with a law enforcement officer is consensual is whether "a reasonable person would feel free 'to disregard the police and go about his business.'" *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991)). The trial court must look at the totality of the circumstances surrounding a statement of consent to determine if that consent was voluntary. *Lackey v. State*, 638 S.W.2d 439, 447 (Tex. Crim. App. 1982).

The testimony adduced at the hearing on appellant's motion for suppress revealed that, prior to the morning of January 27, the following events had occurred:

- appellant had met Detective Pinkins previously in connection with the investigation into the complainant's disappearance;
- on at least two previous occasions, appellant voluntarily went to the sheriff's department to answer questions and take a polygraph examination in connection with the investigation;
- on both prior occasions, appellant was allowed to leave the sheriff's department and was given no reason to believe that he was a suspect in the investigation;
- on one of those occasions, appellant had been placed in handcuffs before being transported in a patrol car, and the handcuffs were removed once appellant arrived at the station;
- appellant had never been questioned in connection with the investigation at any location other than the sheriff's department.

On the morning of January 27, after being allowed into appellant's house by his father and led to appellant's bedroom, Detective Pinkins identified himself to appellant and

told him they "need to go and talk," to which appellant replied "Okay." Although Pinkins's weapon was visible, neither he nor any of the other officers had their guns drawn. There was no evidence of any threat, either express or implied, that appellant would be forcibly taken to the station for questioning. In fact, no other conversation took place between any of the officers and appellant, and none of the officers even approached appellant until after he had responded to Pinkins. At the time appellant responded, we conclude that a reasonable person in appellant's situation would have felt free to say "no" or otherwise to disregard Detective Pinkins and go about his business. *See Hunter*, 955 S.W.2d at 104. Instead, by saying "Okay," appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning.[2]

Appellant contends that he was placed into custody when he was handcuffed and placed into a patrol car. However, there is no bright-line test providing that mere handcuffing is always the equivalent of an arrest. *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997). Several of the State's witnesses testified that individuals are routinely handcuffed for safety purposes before being transported in a patrol car. Significantly, the testimony showed that when appellant voluntarily went to the sheriff's department in a patrol car just the day before, he was placed in handcuffs before getting in the car, and the handcuffs were removed at the station. Given appellant's consent to accompany Detective Pinkins to the station for questioning, and given his familiarity with the transport procedures, we find that a reasonable person in appellant's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement. Furthermore, appellant did not resist the use of handcuffs or act in a manner consistent with

---

[2] At the suppression hearing, appellant disputed that any conversation took place between Pinkins and himself before he was placed in handcuffs. However, we afford almost total deference to the trial court's determination of the historical facts that the record supports, especially when the court's fact findings are based on an evaluation of witness credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

anything other than full cooperation with the law enforcement officers transporting him.[3]

Accordingly, we find that the trial court did not err in concluding that appellant had not been arrested before he admitted his involvement in the complainant's death. Appellant's first point of error is overruled.[4]

II.
Enticing a Child

In point of error number two, appellant complains the trial court erred in admitting his confession into evidence because the confession was obtained after law enforcement officers took appellant from his parents' possession in violation of section 25.04 of the Penal Code.[5] Appellant contends that because his confession was obtained in violation of section 25.04, the trial court was required to suppress it pursuant to article 38.23 of the Texas Code of Criminal Procedure.[6]

[3] Appellant asserts that the fact he was taken outside his home wearing only a T-shirt and boxer shorts, with no shoes, is indicative of an arrest rather than a voluntary accompaniment. Appellant presented no evidence, however, that he ever requested an opportunity to dress or that he otherwise complained about his attire during the time he was transported to the police station.

[4] We recognize that this case must be narrowly construed based on the unique facts presented. We express no opinion concerning the outcome of a situation involving similar circumstances, but where the individual had no previous interaction with the police department and its investigative procedures.

[5] Section 25.04, titled "Enticing a Child," states in part:

> A person commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of the parent or guardian of such child. [TEX. PEN. CODE ANN. § 25.04(a) (Vernon Supp. 2001).]

At the time of the alleged offense, appellant was 17 years old.

[6] Article 38.23 states, in relevant part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence against the accused on the trial of any criminal case. [TEX. CODE CRIM. PROC. ANN. art. 38.23(a)

To preserve error, the complaining party must first afford the trial court an opportunity to rule on the specific complaint. *Meyers v. State*, 865 S.W.2d 523, 524 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *see* TEX. R. EVID. 103(a) (stating that error may not be predicated upon the trial court's admission of evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection"). The purpose of requiring a timely and specific objection is to allow the trial court the opportunity to make a determination and ruling on the objection and then to proceed with the trial under the proper procedural and substantive manners, as appropriately corrected by the trial court. *Janecka v. State*, 823 S.W.2d 232, 243-44 (Tex. Crim. App. 1992) (op. on reh'g).

In this case, appellant never asserted section 25.04 or article 38.23 as a basis of his objection in the trial court. Appellant failed to raise this argument in his written motion to suppress or at any point during the pretrial hearing on that motion. At trial, appellant's counsel asserted the following objection to the introduction of appellant's written confession:

> We would object to the introduction of State's Exhibit No. 2 for all the reasons previously stated, both at the pretrial hearing and during the trial of this case. Additionally, we would object that the consent of the parents was not gained in order to waive the substantial legal rights enumerated on the front page of the confession. . . . Those would be the objections to the confession. that it was not free and voluntary.

Appellant's objection is not sufficiently specific to make the trial court aware appellant was asserting that his confession was obtained in contravention of section 25.04 of the Penal Code, and thus should have been suppressed pursuant to article 38.23(a) of the Texas Code of Criminal Procedure. *See* TEX. R. APP. P. 33.1(a). Because appellant's trial objection does not comport with his argument on appeal, appellant has failed to preserve error on this issue. *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996). An

(Vernon Supp. 2001).]

argument on appeal that does not comport with the trial objection presents nothing for review. *Coffey v. State*, 796 S.W.2d 175, 180 (Tex. Crim. App. 1990).

Because appellant's objection at trial did not preserve error, appellant's second point of error is overruled.

III.
Improper Jury Argument

In his third point of error, appellant asserts the trial court erred in overruling his objections to what he claims was improper jury argument by the State. To be proper, jury argument must fall within one of four categories: (1) summary of the evidence, (2) reasonable deduction from the evidence, (3) response to argument of opposing counsel, and (4) plea for law enforcement. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Appellant complains the prosecutor impermissibly called on the jury to speculate about the content of Nicholas Thetford's confession, which was not admitted as evidence. We find that the State's jury argument was proper as a response to the argument of appellant's counsel.

During the cross-examination of Detective Larry Davis, appellant's counsel attempted to impeach Davis with testimony he had given at the pretrial hearing on appellant's motion to suppress. Specifically, appellant's counsel introduced Davis's testimony that while questioning appellant the morning of January 27, Davis provided appellant with information that Nicholas Thetford had given him, such as appellant being at the scene, Thetford taking the complainant outside the house, and then Thetford stabbing the complainant before handing the knife to appellant. Before Davis was called as a witness at trial, Thetford himself testified and gave his account of the events surrounding the complainant's death.

During jury argument, appellant's counsel made the following argument with respect to his client's confession:

> I want you to read it carefully when you go back there. And when you do, you will see that it is consistent with the first confession that Nicholas Thetford gave.

Appellant's counsel then again read Davis's testimony from the pretrial hearing to the jury and stated:

> Nicholas Thetford confessed and said: I handed my knife to Robert Kaupp. Now, he's telling you something different about the knives and all kinds of stories.

In rebuttal, the prosecutor made the following argument, which serves as the basis for appellant's third point of error:

> Also, something real, real important that you need to think about. Nick Thetford gave both a written and a videotape confession. If he says what Davis said he said, they would show you this confession.
>
> . . . .
>
> That's right. It's not submitted to the jury because Davis was confused in that big loose-leaf looking transcript they had of the pretrial hearing. Davis got confused on one issue and they would like you to believe that was Nick Thetford's confession. If that was Nick Thetford's confession, Nick Thetford's confession would have been submitted into evidence as a prior inconsistent statement.
>
> . . . .
>
> Nick's videotaped confession where he said something different than he said on the stand would have been admitted. On their effective cross-examination – or perhaps it was on my direct. I forget which – Davis got confused on one point and they would like you to believe that is Nick Thetford's confession. It's not. That's just Davis reciting what he thought were some investigative techniques. And if he got the facts mixed up, shame on Davis, but that's not Nick Thetford's confession. Nick Thetford's confession is not evidence. They didn't offer it into evidence because it is not consistent –
>
> . . . .
>
> I can't introduce a prior consistent statement. They can introduce a prior inconsistent statement.

Viewed in context, it is clear that the prosecutor was merely responding to appellant's counsel's suggestion that Thetford had given police a confession that was inconsistent with his trial testimony regarding appellant's role in the murder. Hence, appellant's counsel opened the door to a response by the prosecution that if Thetford's confession was truly inconsistent with his testimony at trial, the confession could have been used by appellant's counsel to impeach Thetford on the stand. *See* TEX. R. EVID. 613. Argument in response to and invited by opposing counsel does not constitute reversible error even though it refers to a matter not in evidence. *Miller v. State,* 479 S.W.2d 670, 672 (Tex. Crim. App. 1972). We overrule appellant's third point of error.

The judgment below is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 7, 2001.
Panel consists of Justices Yates, Fowler, and Lee[7].
Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Justice Norman Lee sitting by assignment.

Appendix 2

strument that has not been introduced into evidence.
THE COURT: That is overruled.
Q. (By Mr. Wisner) Go ahead.
A. Okay. The statement indicated Mr. Kaupp as ...g present when the murder occurred.
Q. Present or more than present?
A. Present and assisting with it.
Q. How do you know --
MR. PHILLIPS: Can I have a running ...ection to all of the questions so I don't have to ...ct each time as required to the statement of ...olas Thetford as hearsay.
THE COURT: I understand that. You will ...e to make objections as they come up on that topic.
Q. (By Mr. Wisner) Put us in your shoes as a ...side investigator. You have a guy who has been ...ng an illegal inappropriate incestuous sexual ...ionship with his half-sister, right?
A. Yes.
Q. He's been lying to you for two weeks about ...ct she is, right?
A. Yes.
Q. And he says: Hey, I did it with someone else. But the someone else ain't got no motive ...d you ain't got any physical evidence to indicate that

...e else is involved. Follow me so far?
...Yes, I do.
...How do you know whether or not it's a truthful ...or he is just trying to cast off blame?
...We don't. That's why we wanted to speak with ...
...Why did you want to speak with Mr. Kaupp then? ... you just wait to, say, 1:00 o'clock the next ...
...Well, it was ongoing investigation and ...lost waiting. We might be able -- or ...might be able to call Mr. Kaupp and ...his story. They can do different things.
...MR. PHILLIPS: Judge, I object. That ...speculation.
...THE COURT: Overruled.
...(By Mr. Wisner) I'm going to ask you a few ...tions and then we'll get back to that.
...The statement from Nicholas Thetford, what ...is the Sheriff's Department making to ...body?
...Was all out effort. We sent -- well, we ...the scene there.
...What scene?
...We at Nicholas Thetford's house.

Q. To your knowledge, when you started to go to Nicholas Thetford's house, where were you expecting this defendant, Robert Kaupp, to be?
A. At the house.
Q. Why were you expecting him to be at the Thetford house not his parents' house?
A. Well, he had been staying over there recently, from what I understood, approximately a week.
Q. How many folks went out to look for the body and how many folks went out to look for the defendant?
A. We all proceeded to Robert Thetford's house because that's where Mr. Thetford had seen him last anyway prior to coming to the Sheriff's Department to talk with his son.
Q. And where was your investigation centered on finding the body?
A. At Mr. Thetford's home.
Q. Where?
A. In the culvert to the side of the house.
Q. About what time was it that you mobilized or made plans to go to the Thetford home?
A. Approximately 1:00 o'clock a.m.
Q. And how many people are assigned to go there?
A. I'm saying approximately 12 people, including supervisors.

Q. Now, was there any clear definition on who was going to look for the body and who was going to look for the defendant?
A. No.
Q. When you went out to try to find the defendant, was it possible that he may aid or assist you in this case? ... in this case?
A. Yes.
MR. PHILLIPS: Objection, Your Honor. It's leading and suggestive.
THE COURT: That's sustained as to the form of the question.
Q. (By Mr. Wisner) In what way could this defendant have helped in this case?
A. Well, he could have given us corroborating evidence. He could have helped us. He could have been a witness to the crime. He could have let us know any particulars of anything he may have seen.
Q. Let's say hypothetically that you go out to meet with Robert Kaupp and he says: Hey, I'm in the next room. Nicholas wanted sex with Destiny and she said no. Then he cut her throat?
Could you then file higher charges on Nick.
A. Yes, I can.

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Q. That certainly does not make the ...endant ...ity of murder or capital murder, does it?
A. No, it doesn't.
Q. Did you find the defendant at the Thetford ...se?
A. No, we didn't.
Q. So, where did you to?
A. We sent -- several of the officers and myself, ...nt to Robert Kaupp's house.
Q. And what is that address on the Kaupp house?
A. I just read it.
Q. Let me help you. 5218 Shady Oaks Lane?
A. That's correct.
Q. Is that within the City of Friendswood or an ...corporated area of Harris County?
A. Unincorporated area.
Q. How far is that from the Thetford house?
A. I would say, on a straight route, ...roximately a mile.
Q. And how many of you went?
A. Approximately six.
Q. How many different cars?
A. I can remember four.
Q. Why did you need six folks and four cars to ...t for the defendant?

A. Well, we had two marked patrol units, ...Pinkins and his partner at that time. ...Davis went in his car. Myself, I was alone. ...There was a patrol supervisor out there, also.
Q. Why did you get the uniformed unit out there?
A. Well Detective Pinkins and myself are kind of ...black. And being out in Friendswood in the ...of the night knocking at somebody's door, we ...get a good reaction. ...get a good reaction.
Q. Had you ever been at the Kaupp home before?
A. No, I hadn't.
Q. Was there any specific plan made as to how you ...going to approach the Kaupp house to see if the ...was home?
A. Basically, our normal tactic, as far as if we ...went into a house at night, is we would surround it ...and every aspect of the house was secured. And ...then a detective knock at the door.
Q. Did you call the Kaupp residence before you ...left?
A. No, we didn't.
Q. Why not just, say, call and say: Hey, is your ...home?
A. Well, we didn't know -- at that time, we ... -- I didn't think we had a number, but as

far as why we didn't, ...erything was going --
Q. Why not just call and alert Robert Kaupp: Hey, somebody has been saying "x" about you. We want you to think about it and we'll be there in a few hours. Is that a smart investigative technique?
A. We wanted to get his initial original response, not enough time for him to think of different avenues or ways of, you know, explaining why we had this type of evidence. And you know, we didn't want to give him a "heads up" on everything that we was doing.
Q. Were you hoping to still keep the element of surprise?
A. Yes, we were.
Q. About what time was it that you got to the Kaupp residence?
A. Approximately 3:00 o'clock, if I am not mistaken.
Q. A.m.?
A. Yes.
Q. Who goes to the front door?
A. Detective Pinkins and Detective Davis.
Q. How about the uniformed officers?
A. Some of them were on the side of the house with myself. And I'm thinking one was close to the vicinity. I'm not sure.

Q. Why are you putting folks on the side if at this time you have no reason to believe he is a suspect in the case?
A. Just in case. We don't know what his involvement is in this murder.
Q. How far away were you from the front door when somebody knocked on the front door?
A. Probably around 15 feet, ten to 15 feet. ... around 15 feet, ... was around the corner. I think there's a garage area in front and I was around there.
Q. Who knocked on the front door?
A. Detective Pinkins, if I'm not mistaken.
Q. Could you hear how many times he knocked?
A. No.
Q. Was there any response from inside the house?
A. Yes. A light came on and I could see him talking to someone at the door.
Q. Was the door opened or was Pinkins talking through a closed door?
A. The door was opened.
Q. Could you hear what Pinkins was saying?
A. Not necessarily, no.
Q. What did you hear, if anything?
A. Not too much. I seen the gesture, you know, of letting him into the house, come in. And that's when

Appendix 3

uary 26, 1999?
A. He was having fun with his friend.
Q. I also want to go back, if I could, to the iod of time after Nicholas Thetford confessed with s father's help to the FBI. What was your first e and first option that you wanted to pursue in s of getting this defendant in for questioning.
A. All right. We called or I called the District ney's Office and asked for a pocket warrant.
Q. About what time was that?
A. Approximately, mid -- well, it was after ight.
Q. And what part of the DA's Office was open?
A. The District Attorney's intake section.
Q. How does a pocket warrant differ from, say, g formal charges on somebody?
A. Well, at that time, we did not have enough cible cause or enough information to obtain a ete warrant, an arrest warrant. We didn't have any rmation as far as him being involved in any crime.
Q. Then why did you want the pocket warrant? How you think that would aid you in this investigation?
A. We use it as an investigative tool. We rview them and, basically, try to obtain information would, you know, help us in the case.

Explain that to us. Let's say you want to e. How does obtaining a pocket warrant help rview me? Under what circumstances?
ell, we are able to bring you -- in other you in custody and bring you down there.
ven if I don't want to go?
ven if you don't want to go.
e you able to obtain a pocket warrant with the District Attorney's intake division?
it was --
MR. PHILLIPS: I'm going to object if hearsay is the answer, Your Honor. I'm there might be.
THE COURT: I'll rule on that when you er.
Mr. Wisner) Do you know why they wouldn't the warrant?
MR. PHILLIPS: Objection, Your Honor, of his own personal knowledge.
THE COURT: Overruled.
oke with the DA and he told me --
MR. PHILLIPS: Objection, Your Honor. hearsay.
Mr. Wisner) I'll ask you a different o we can move on. Did you actually go

1 before a judge?
2 A. No, I didn't.
3 Q. Did you actually prepare a warrant and the
4 judge wouldn't sign it or you never even prepared a
5 warrant?
6 A. No, we didn't.
7 Q. You didn't do what?
8 A. We didn't go before a judge or try to get an
9 arrest warrant.
10 Q. If you had obtained a pocket or arrest
11 warrant, how would your approach, if it would have, to
12 the Thetford residence differ from what you actually did
13 in the early morning hours of Wednesday, the 26th?
14 A. Basically, we asked for permission to enter
15 the house and asked him to come with us in reference to
16 the case. We needed to speak with him in reference to
17 it. With an arrest warrant, there would have been no
18 option. We would have made forced entry, if we had to,
19 and obtain him and he would have been brought down to
20 the Sheriff's Department.
21 Q. Did you have any firearms out when you entered
22 the Kaupp residence early that Wednesday?
23 A. No.
24 Q. If you had an arrest warrant, would you have
25 used firearms or not?

1 A. They would have been available, but it's
2 according to, you know, what situation we had.
3 Q. I believe, when we ended yesterday, I asked
4 you if there was a conscious decision made to drive the
5 defendant by any location on the way to Lockwood?
6 A. Yes, it was.
7 Q. Why?
8 pocket warrant if he had any knowledge of what
9 was going on, we wanted him to know that we knew where
10 Destiny was and what was going on.
11 Q. So, what did you do?
12 A. Basically Detective Pinkins and Detective
13 Davis drove him --
14 MR. PHILLIPS: Your Honor, I'm going to
15 object. He was asked what he did. Not responsive.
16 THE COURT: Sustained.
17 Q. (By Mr. Wisner) What plan was formed amongst
18 you as to what you were going to do with the defendant
19 on the way down to Lockwood?
20 A. We would have Detective Davis and Detective
21 Pinkins go to the area -- not exactly where the scene
22 was, but visually he could see the area where the scene
23 was being located. He could see that we were working in
24 that area and he would know that we knew.
25 Q. When you saw the defendant leave his

answers Nicholas had given me.
Q. Did that strike you as strange?
A. At that point in time, no.
Q. How long did you question Nicholas for?
A. At least 30 minutes, I would say.
Q. Did he ever give you any leads or indicate he knew where his sister was?
A. No.
Q. Did you ever specifically question the defendant as to what he knew?
A. No.
Q. Were the questions all to the defendant kind of secondhand through Nick?
A. I would say more secondhand through Nick.
Q. How long overall did you stay at the Thetford residence that night?
A. I think all in all it was probably roughly two hours.
Q. When you saw Nicholas Thetford during however long you spent with him in the living room, how did he appear to you? What was his appearance like?
A. You said Nicholas?
Q. Yes.
A. He was clean cut. He seemed to be a little nervous.

Q. But in terms of his physical appearance, how did he look?
A. He looked fine.
Q. Did you see any blood on him or signs of struggle or anything like that?
A. No, sir.
Q. How about this defendant, what did his appearance like?
A. It was the same. He didn't appear to be in a struggle or anything.
Q. Any cuts on either of their hands?
A. Not that I observed.
Q. Any bruises on their fists or anything to indicate that they had been in a fight?
A. No, sir.
Q. Any cuts or scrapes anywhere on them?
A. No, sir.
Q. Did you see any blood anywhere on them?
A. No.
Q. I need to take you forward in time. I guess it would be 13 days from there to the early morning hours of Wednesday, January 27th of 1999?
A. Yes.
Q. Were you called to assist homicide on that

A. Yes.
Q. How did you come to be called to assist homicide on that day?
A. I was asked to meet them at a location near the scene, the place we would be going to.
Q. And did you receive any instruction at the scene?
A. At that point in time, the only thing I had been told is that we were going to the house and try to talk to Mr. Kaupp.
Q. Were you going to have anything to do with the recovery of the body?
A. No.
Q. Which house were you going to talk to Robert Kaupp?
A. We went to the Thetford house first, 16006 Leigh Canyon Drive.
Q. About what time did you get to the Thetford residence?
A. Definitely after midnight. I can't be certain of the time.
Q. Did you enter the Thetford residence?
A. Yes.
Q. Who let you in or how did you get in?
A. Mr. Thetford let us in.

Q. Are we talking about Red Thetford?
A. Yes, the father.
Q. What did you do once you got in?
A. We checked the residence, went room-to-room looking for Robert Kaupp.
Q. Did you find him?
A. No.
Q. What did you do?
A. At that point in time, we went to Mr. Kaupp's residence on another street.
Q. About how far away was it?
A. Driving distance, I would say about two miles.
Q. Was the Kaupp residence in an unincorporated area of the county or was it actually in Friendswood?
A. Friendswood.
Q. Harris County, Texas?
A. Yes.
Q. You still have authority within areas that are incorporated areas, but within the county?
A. Yes.
Q. How many officers went over to the Kaupp residence?
A. At least three uniformed and at least three detectives.
Q. Was there any specific plan that you had

you got there?
A. At this point in time, I was just told we need to talk to him.
Q. Was there any specific plan, who was going to knock for him, who was going to speak first, who was going to knock? Did you form that out?
A. I believe Detectives Pinkins and Barnes went to the door and others went to different parts of the exterior of the house.
Q. When those two folks went to the door, where were you?
A. I was at the front door just behind them.
Q. Explain to the folks on the jury who aren't officers, if you have nonuniformed people going to somebody's house in the middle of the night, how does it help to have a uniformed officer and squad car outside?
A. Having a uniformed officer and squad car helps people, the residents of the house, to realize it is law enforcement and not just somebody knocking at the front door. It makes it a little more real, I guess, if there are definitely police outside and not just somebody wanting to kick in the front door.
Q. Did anybody ring or knock at the front door?
A. Either Detective Pinkins or Barnes did.

Q. Can you recall if they knocked or rang the bell?
A. I don't recall.
Q. How long did it take before there was a response from inside the house?
A. It was a few minutes.
Q. What kind of response did you get from inside
A. There was a gentleman that opened the door.
Q. I'm kind of confused.
The gentleman that opened the door, how old was he?
A. Mid 40s, roughly.
Q. Is he the same fellow that's been waiting to testify in this case?
A. I don't know.
Q. In either case, who did you believe the man to be?
A. I believed it to be Mr. Kaupp's father.
Q. Was Mr. Kaupp's father nice to you? Was there yelling or screaming or swearing back and forth?
A. No, sir.
Q. Who spoke first, the person you believed was Robert's father or one of the officers?
A. I believe it was Mr. Pinkins letting the

gentleman know who we were and that we wanted to talk to Robert, if he was there.
Q. As best you can recall, what did Pinkins say?
A. He had identified that we were the Harris County Sheriff's Department and basically asked if Robert was there and if we could talk to him.
Q. What kind of response did he get?
A. I believe the father said: He's here and you can talk to them.
Q. And what did the father do?
A. Then at that point in time, he held the door and let us come in.
Q. What did you do once you got inside the Kaupp residence?
A. Mr. Pinkins -- Detective Pinkins, I believe, spoke to the father a few minutes. Then the father led us to the first front bedroom where Robert was at.
Q. Could you hear what Pinkins and the father were saying?
A. I wasn't listening at that point in time.
Q. What happened after Pinkins and the father spoke?
A. We went to the front bedroom and Mr. Kaupp's father identified the door at the front of the house as being where Robert was at.

Q. And what happened after that?
A. Detective Pinkins went to the door and spoke to, I believe, Robert.
Q. Who opened the door?
A. I believe it was Detective Pinkins.
Q. Was there any kind of lock on the door?
A. No.
Q. How many officers were present?
A. Detective Pinkins, myself, and Deputy Calhoun, if you [illegible]
Q. When the door was opened, was there any light inside the room?
A. No, it was dark.
Q. What was the first thing you saw inside the room?
A. I believe a dresser and some clothes on the floor.
Q. Did you hear anything unusual going on?
A. No.
Q. Did you hear Pinkins speak?
A. He addressed an individual I later found out was Mr. Kaupp.
Q. Who spoke first, Pinkins or the person who was inside the room?
A. I believe it was Detective Pinkins.
Q. What did you hear him say?

struggle with the officer that was handcuffing him
e he was in his boxer shorts?
A. Not really, no, sir.
Q. Pardon?
A. No, sir.
Q. I thought you told the jury that meant to you
e went voluntarily?
A. I'm sorry. I presume I misunderstood the
on. I was thinking along the lines of handcuffing
people who had resisted.
Q. Well, did the fact that he did not struggle
the arresting officer mean that he went
arily, in your opinion?
A. Yes.
Q. I see. So, if he obeys the law and does not
arrest to you, that means he voluntarily goes
and consents to the arrest?
A. Again, yes.
Q. And that's why you are telling this jury that
ought he consented.
A. He never said he wouldn't go.
Q. Have you heard of the Fifth Amendment, sir?
A. Yes, I have.
Q. That means when a person is confronted by a
officer, he doesn't have to answer questions,

e?
A. That's correct.
Q. He doesn't have to tell that police officer
m the police business, does he?
A. No, sir, he doesn't.
Q. In fact, he has a right to sit there and not
ything?
[illegible]
Q. But you are saying that, because he sat there
didn't say anything, he must have consented?
A. Again, he was detained at that point in time.
don't call it an arrest. He was wanted only to be
with.
Q. Well, he was detained, yes?
A. Correct.
Q. He couldn't walk away?
A. No, sir.
Q. So, you are trying to draw, from his silence,
ption of his guilt or lack — that he consented
he was silent. That is what you are telling
y, is:
Please ask that one more time.
You are telling this jury that, because there
onstration, he must have consented?
A. He didn't resist. So, yes.

Q. Had there been a commotion, he would have
violated the law; would he not?
A. Yes.
Q. You would have called that resisting arrest?
A. Yes.
Q. Had he struggled even harder, he would have
violated the law, which would have been a felony called
assault on a police officer?
A. Possibly, yes, sir.
Q. Because he followed the law, you are going to
say he consented to his confinement?
MR. WISNER: Judge, that's been asked and
answered five times.
THE COURT: Overruled.
A. Restate it again, please.
Q. (By Mr. Phillips) Because he followed the
law, as any good citizen would do, you are telling this
jury that he consented to being hauled out of his house
and taken to the police station?
A. Yes.
Q. Now, you also told this jury that the father
didn't raise any fuss with us?
A. Correct.
Q. So, are you telling the jury that because the
father conceded to the authority of your uniform and the

two police detectives, and did not struggle with them or
fight to keep his boy in that home, that he must have
consented to have his boy hauled out in handcuffs and in
his boxer shorts with no shoes and a T-shirt in the
middle of the night?
A. Yes, sir.
Q. And you are further telling this jury that
when he was outside and said: Look, take my handcuffs
off. I want to go back in this house, you could not
have done that because of your instructions and your
training and your procedures?
A. He could have taken them off.
Q. But you wouldn't have, would you?
A. No, sir.
Q. I mean, from the moment those handcuffs were
on him, he was going down to that police station, wasn't
he, unless one of the detectives came to you and said:
You don't need to take him down?
A. Yes, sir.
Q. Whether or not he wanted to go or not was not
the question?
A. That was the detective's decision, not mine.
Q. But that was the choice they made?
A. I guess so.
Q. And you didn't have a warrant for his [illegible]

d we detain them and put t[illegible] custody.
Q. You can't enter a h[illegible] unless you know the
spect is there; isn't that true?
A. He can go in their address if it's a listed
rrent address.
Q. And in this instance, you would have gone to
door and knocked on the door first, wouldn't you?
A. Maybe, yes.
Q. When his father came to the door, the head of
household, wiping sleep out of his eyes, you would
e told him: We need to talk to your son. Is he
re?
A. It wouldn't have been that much talking. He,
most likely, would have been brushed aside. We would
e immediately hit each room.
Q. Then you would have done what with the
fendant had you found him?
A. As far as cuffing him and taking him to the
cle?
Q. Yes, sir. Exactly the same thing you did with
s defendant?
A. No, we didn't.
Q. You wouldn't cuff somebody when you arrest
?
A. You said the same as I did with this

dual.
This individual was cuffed in his bedroom; was
?
From what I understood, yes.
He was not allowed to talk to his parents?
That's wrong.
Were you present when he had a conversation
parents?
present with the parents, but he wasn't with the
parents, but he [illegible] to speak with his p[illegible]
to speak with his parents.
Did you allow him to speak with his parents?
He did not ask to speak with his parents.
Did you tell him he could speak with his
You were handcuffing him and having the
ng him out of the house?
We did not.
So I take it from what you say that he was
suspect at that point in time?
At that point in time?
, sir.
ght.
me rewind you back a little bit in time to
got involved with all of this going on.
go through it a little bit and see where
[illegible]

You said you really got involved in it
around January the 20th.
A. That's when the case was assigned to me.
Q. And you said that, if I remember correctly,
you made a determination that Destiny Thetford was
having a lot of problems at home, with school, sickness,
and with going to the doctor, but not wanting her father
to take her to the doctor?
A. Wrong.
Q. Pardon?
A. That's wrong. The last statement was wrong.
Q. Explain to me all of this and why it had
significance to you. What was it? What was the
problems she was having at home?
A. She was originally reported as a runaway. We
needed to interview, basically, everyone in the home,
the household. Reading the report that was recorded by
the originating officer, she had problems with her
brother. Also, she was complaining of an illness.
Q. Let's stop right there. She had what kind of
problems with her brother?
A. As far as fighting and maybe sexual
encounters.
Q. Well, we have heard, I think, about the sexual
encounters. Let's talk about the fighting. That's the

first I have heard about that. Tell me about the
fighting problems she was having with her brother?
A. From what I understood, they had arguments.
Q. Physical arguments?
A. From what I understood, yes.
Q. And what is that you understood, sir?
MR. WISNER: Judge, I object to this.
It's all based on hearsay.
parents, but he THE COURT: Sustained. THE COURT: S
unts. MR. PHILLIPS: (Your Honor, we are offering S)
it for the purpose it was used by him in reaching
conclusions to which he has testified to the jury. And
having reached the conclusion based on this information,
we're entitled to test that conclusion.
THE COURT: Are you offering it for his
state of mind?
MR. PHILLIPS: For his state of mind and
how he reached the conclusion.
THE COURT: That would be overruled.
MR. PHILLIPS: We offer it further to
test the conclusion, Your Honor.
THE COURT: You are offering it for his
state of mind?
MR. PHILLIPS: No. I offer it to test
the conclusion that she was having problems in fighting

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Q. Now, let me ask you thing. Is it common
common, based on your ex ce as a homicide
tive, when you are interviewing one suspect and
ing them know another suspect has rolled over on
, what kind of effect does that generally have on
t?
A. Generally, it's an effect where the person
e forthcoming with information.
Q. I'm trying to think of an expression so bear
e a second, if I could. Is it basically at that
that either you talk up for yourself or the other
is going to do all the talking about everything
ppened? Does that sound fair to you?
A. Yes, that's fair.
Q. And what did you do with the defendant after
the stop off near the Thetford residence, where
re going about recovering the body?
A. He was transported to Lockwood.
Q. How about you? What did you do, sir?
A. Davis and I drove to Lockwood in my car.
Q. Did you keep sight of the vehicle the
was in on the way to Lockwood?
A. Yes.
Q. Was the defendant read his rights at his
idence?

A. No.
Q. Was the defendant questioned at his residence?
A. No.
Q. What did you do with the defendant once you
to Lockwood?
A. He was placed in the interview room.
Q. Explain what this interview room looks like,
.
A. Approximately a ten-by-ten room, approximately
the interviewer and interviewee, and interviewer and
there is a table in there for writing on.
Q. Who went into the interview room?
A. Davis and myself.
Q. Who else?
A. Rapp.
Q. Was the defendant handcuffed at this point?
A. The cuffs had been removed when he was taken
.
Q. Were Davis and you dressed?
A. In plain clothes.
Q. Did you have firearms visible?
A. No.
Q. How did you go about interviewing the
What's the first thing you did?
A. The first thing we did is we confronted him

with what rd had told us.
Q. Have you read the defendant his rights first?
A. Yes.
Q. Did the defendant appear to understand his
rights?
MR. PHILLIPS: Judge, we have an
objection, which is the same as the other objection, but
it's different as to this is a little bit. We'll do it
either in the presence of the jury or out of the
presence of the jury. It is the Court's pleasure.
THE COURT: Why don't you approach the
Bench and give me a little better idea what we are
talking about.
(At the Bench, on the
record.)
MR. PHILLIPS: At this point, they are
going to interrogate him in the interview room. They
have read him his rights. The objection is, assuming
that the officers say they didn't get the consent from
his parents for the waiver, that the consent which he
gave is inadequate and is not legal consent. And
therefore, the conversation would be or should be kept
out of the jury.
THE COURT: Your objection is under the
Family Code because they didn't get a waiver from his

parents prior to talking to him at this point. So, you
are renewing that objection?
MR. PHILLIPS: We're renewing the
objection as to the waiver that was read to him. The
waiver that was read to him, proper consent was not
gotten because they didn't get it from the parents in
accordance with the Family Code.
THE COURT: That would be overruled.
MR. PHILLIPS: We will have a running
objection to everything that happened. And at the time that
we get to the confession, we will raise the objection.
THE COURT: All right.
(End of proceedings at the
Bench, on the record.)
THE COURT: You may proceed, sir.
MR. WISNER: Thank you, Judge.
Q. (By Mr. Wisner) What rights did you read to
the defendant?
A. The Miranda warnings from the blue card.
Q. And did he appear to understand all of his
rights?
A. Yes.
Q. And did he agree to speak with you?
A. Yes.
Q. How would you describe the defendant's

A. Right. That's correct.
Q. Did you tell him: We n go down to the
ction?
A. No.
Q. Did you tell him: You need to be handcuffed?
A. No.
Q. Well, he was handcuffed immediately?
A. Yes, he was.
Q. And you saw him handcuffed and he had his
shorts. He had no shoes on. He was not dressed
a January night, true?
A. He had on his shorts.
Q. Okay.
A. And he was handcuffed, yes.
Q. But he was not dressed for a January night?
A. I don't know what the temperature was that
t, sir.
Q. I see. And you led him handcuffed, in his bed
s, and took him immediately out of the house?
A. That's correct.
Q. You could have stopped it?
A. That's correct.
Q. You were the officer in charge?
A. One of the officers in charge.
Q. At that point, in that room, you were the

r in charge?
A. That's correct.
Q. So, you told the district attorney that you —
had been you, you would have let him get dressed.
had the ability to let him get dressed, didn't you?
A. No, no, I didn't.
Q. You couldn't tell that officer to take those
uffs off of him right now?
A. No.
Q. I see. So you had started the arrest and you you
't stop it?
A. We had never started an arrest.
Q. Well then, why couldn't you tell the officer
ke those handcuffs off if he was not under arrest?
A. Because they were going to be transporting him
they were the ones who put the cuffs on for their
ety purposes.
Q. They didn't have to transfer him right then
se you wanted to talk to him there.
A. No, I didn't.
Q. What you wanted to is do these things you told
t in a confession; isn't that true? You wanted
ple. You wanted confusion. You wanted no time to
k or reflect. You wanted insecurity. And you
d a show of police authority. And you got every

one of those ight in that house by handcuffing him
and rushing hi to the car without even being able
to talk to his parents; isn't that true?
A. No.
Q. Well, which one of those things did you not
get by your actions that night with seven police
officers and five cars parked out in front of his house?
A. I didn't get any of them.
Q. You don't think he was surprised when you
burst in on him at 3:00 o'clock in the morning?
A. I don't know.
Q. What would you think?
A. He may have been and may not have been
surprised. He had been cooperative. He had been
dealing with Detective Barnes on a regular basis.
Q. You don't think he was confused when you
yanked him out of a dead sleep, handcuffed him, and had
him outside in a patrol car from a secure environment
within a matter of minutes?
A. I don't know.
Q. You don't think he was afraid when he had been
yanked out of his bed, his parents' house and did not
even have the ability to sit and talk with his parents
for a few moments or even get dressed?
A. I don't know.

Q. You don't think that would cause a feeling of
insecurity?
A. No, I don't know.
Q. Well, don't you think these five things are
counterproductive to what you are telling this jury?
THE COURT: For the record, are you
approaching the witness?
MR. PHILLIPS: Yes, Your Honor.
Q. (By Mr. Phillips) When he signed this Mr. Phillips, the
statement of a person in custody statement of a person in custody
A. What was your question?
Q. Do you think these five elements of your
tactics in trying to get this statement signed are
counterproductive of this statement: I knowingly,
intelligently, and voluntarily waive the rights above
and make this voluntary statement?
A. Do I think they are counterproductive?
Q. Yeah. Don't you think they conflict a little
bit with voluntariness, surprise and confusion?
A. No, sir.
Q. Intelligent decision, surprise, confusion. No
conflict?
A. No.
Q. I take it, in your opinion, Nick Thetford was
not a credible person?

...sor once you first saw him down a Lockwood
...ction?
A. I want to say surprised. He was like -- I ...t he was trying to figure out what was going on.
Q. How would you contrast that to the way he ...ed on the previous two days?
A. A little bit more subtle, if I may, for lack ...a better word.
Q. Once you read the defendant his rights and he ...ressed to understand all those rights, how did you go ...o questioning him? What's the first thing you did?
A. The very first thing we did was confront him ...with what Nick Thetford had told us.
Q. Did you actually show him Thetford's signed ...tatement?
A. No.
Q. What did you do?
A. Just basically said this is what Nicholas has ...told us about Destiny's disappearance. He denied any ...knowledge about it.
MR. PHILLIPS: Judge, we'll object to any ...conversation with him.
THE COURT: Overruled.
Q. (By Mr. Wisner) So, what did you do?
A. After he denied it, we then confronted him

...the fact that Thetford had, in fact, accused him of ...fatally stabbing Destiny Thetford and that he was the ...cause of her death.
Q. In Thetford's confession, did he put most of ...the blame on who, himself or the defendant?
A. I think on himself.
Q. But in either case, did he give a substantial ...portion of the blame to the defendant?
A. Yes.
Q. What was the defendant saying when you -- tell ...me, Thetford is saying this?
MR. PHILLIPS: We'll object to the ...conversation with the defendant. The oral conversation ...does not the criteria in the Criminal Code or the ...admission of oral statement while under custodial arrest. ...I believe, if I ask the officer, he will tell me at ...what point he was under custodial arrest.
THE COURT: Your objection will be ...noted as to anything that was said by the defendant ...that was not a statement against penal interests.
MR. WISNER: Judge, I'm offering this to ...show up the voluntariness of the statement because I ...think the jury is going to get an issue on whether or ...not he freely and voluntarily gave the statement.
So, unless I show the interaction between

1 the two, I don't k... ...ow I would unless that's not
2 going to be an issue before the jury.
3 THE COURT: Approach the bench, please.
4 (At the Bench, on the
5 record.)
6 THE COURT: Your objection is what now?
7 MR. PHILLIPS: My objection is the oral
8 admissions which he made subject to questions asked by
9 this officer at this point in time.
10 THE COURT: Oral admissions?
11 MR. PHILLIPS: Oral admissions, oral
12 conversations, his responses to the questions of this
13 officer.
14 THE COURT: Okay. That will be overruled.
15 (End of proceedings at the
16 Bench, on the record.)
17 MR. PHILLIPS: Can we have a running
18 objection, Your Honor?
19 THE COURT: Yes, sir.
20 Q. (By Mr. Wisner) Let me go back one-half step.
21 Whatever you said to the defendant at first about what
22 Nick said and he said: Hey, I didn't have anything to
23 do with it, how do you change the facts or change what
24 you say to him to get him off center?
25 A. We reminded him about the stop we made before

1 coming to Lockwood and then continued to tell him that
2 the only way we could have known that is if Nicholas had
3 told us what happened.
4 Q. How long did the defendant deny having
5 anything to do with the body in the pipe?
6 A. Ten, maybe 15 minutes. I'm not sure.
7 Q. What types of things are you and Davis saying?
8 A. We're continuing to confront him about things
9 that Thetford had told us and the fact that we had
10 recovered the body and the fact that Thetford was
11 blaming him for the stabbing.
12 Q. At some point, does this defendant represent
13 to you a change?
14 A. Yes.
15 Q. And that took about how long?
16 A. About 10 or 15 minutes.
17 Q. What is the first thing the defendant said to
18 indicate to you that he was changing his story about
19 what happened to Destiny?
20 A. He stated: I will tell you the truth.
21 That was his statement.
22 Q. Where did you go from there? How do you go
23 about getting him to tell you his version of the truth?
24 A. Once he stated that, he went ahead and started
25 giving us a version of what happened.

Q. How long did you rema... the interview room?
A. At that point?
Q. Yes, sir.
A. Probably five or ten minutes.
Q. Is Davis still in there with you?
A. Yes.
Q. Where do you go from the interview room?
A. We go out to the open office space.
Q. Why?
A. So, we can actually type the statement out.
Q. Explain the setup for us, if you could.
A. It's an open office space with cubbyholes on ...side. And there are, like, three or four desks, ...are utilized by the secretary and we were at one ...the secretary's desks.
Q. So, you were sitting where?
A. At the secretary's desk and he was sitting ...behind me so that he could see the screen, the ...computer screen.
Q. When you say "he," you mean who?
A. Mr. Kaupp.
Q. How do you go about getting the defendant's ...recollection typed into the computer?
A. I allowed him to dictate his version of it. ...As he dictated it, I typed it.

Q. Was the defendant looking at the screen?
A. Yes.
Q. Was the screen reflecting what you were ...typing?
A. Yes.
Q. Did the defendant change or modify anything as ...you were typing?
A. I don't remember.
Q. How long did the typing go on for? ...long did the typing ...
A. Quite some time. ... some time.
Q. About what time did you start typing?
A. Sometime after 5:00.
Q. Were you able to finish typing?
A. No.
Q. What happened to you?
A. I got tired. I was kind of fatigued and I ...couldn't type that fast. It was going, like -- we were ...there, like, overtime trying to get it typed out.
Q. Did you actually ever fall asleep while you ...were typing?
A. I may have.
Q. Who took over for you?
A. I asked Davis to finish typing the statement.
Q. What did you do as Davis finished typing the ...statement?

A. ...next to Kaupp as Davis was typing the
2 statement.
3 Q. Now, how long did the typing go on, from the
4 time you started until the time Davis finished?
5 A. I'm not sure, but there is a beginning and
6 ending time on the statement itself.
7 Q. And once Davis finished typing, what did you
8 do?
9 A. He was allowed to read over the statement to
10 make any changes that he wanted to make.
11 Q. Again, "he" meaning whom?
12 A. Mr. Kaupp.
13 Q. And did you have him do that?
14 A. Yes.
15 Q. Did he make any changes to the typed
16 statement?
17 A. None that I can recall.
18 Q. Did the statement contain the statutory
19 warnings?
20 A. Yes, it did.
21 Q. Did you go about having the defendant
22 formalize the fact that he wished to give up those
23 warnings on the written statement?
24 A. Yes.
25 MR. PHILLIPS: Your Honor, at this time we

1 are going to have an objection as to whether or not he
2 consented to the statement based upon the Family Code.
3 THE COURT: All right. That is the same
4 objection you have stated earlier outside the presence
5 of the jury?
6 MR. PHILLIPS: Yes, Your Honor. Section
7 151.0037. And I assume this officer's statement or
8 maybe the statement is stipulating that there was no
9 consent ever obtained. ... consent ever obtained.
10 I probably need to ask the officer ...ably need to
11 couple of questions to make that a good objection.
12 THE COURT: All right.
13 Take the jury out.
14 (Jury out.)
15 (Discussion off the record.)
16 THE COURT: State will stipulate on the
17 record -- somebody please state the stipulation on the
18 record.
19 MR. PHILLIPS: It's stipulated between the
20 defendant and attorney for the defendant and the State
21 that the parents of the defendant gave no consent
22 whatsoever to the waiver of the rights that are
23 enumerated on the written confession, which is State's
24 Exhibit 2.
25 THE COURT: Is that your stipulation,

you went into that house, did you?
A. No, sir. He wasn't under arrest at that time.
Q. So, if he did not freely and voluntarily go
you, nor his parents freely and voluntarily
rest, that would have been an illegal arrest,
't it?
A. Well, possibly.
MR. PHILLIPS: Thank you, sir.
Pass the witness.
THE COURT: You may step down. Thank you,

(Discussion off the record.)
(Jury out.)
(Short recess.)
(Jury in.)
THE COURT: Call your next witness.
MR. WISNER: State calls Gregory Pinkins.

GREGORY PINKINS,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

WISNER:
Q. Sir, would you please state your name for the
s and gentlemen of the jury as well as the Court's
rd?
A. Gregory Pinkins.

Q. What you do for a living?
A. I'm a detective with the Harris County
's Department.
Q. How long, overall, have you been with the
's Department, sir?
A. How long?
Q. Yes.
A. 11 years.
Q. How long have you been in your current
n as a detective?
A. Approximately seven years.
Q. Where are you assigned?
A. Homicide.
Q. How long have you been there?
A. Approximately seven years.
Q. Who is your partner?
A. Detective Barnes.
Q. Of you two -- which of the two is the
the operation and which is the brawn?
A. I'm the brains.
Q. Sir, did you assist him in the investigation
disappearance of Destiny Thetford?
A. Yes, sir, I did.
Q. Sir, did you conduct some of the
and some of the other information gathering

techniques that went on, say, between the 20th and early
on the 27th?
A. Yes, sir, I did.
Q. Now, what time did you get to work on Tuesday,
the 26th?
A. Sometime between 7:00 and 8:00 a.m.
Q. In the morning?
A. Yes.
Q. Did you ever leave work that day?
A. No.
Q. At some point in the early morning hours of
Wednesday, January 27th of 1999, did you and other
officers gather for the purpose of going out to
Friendswood?
A. Yes, sir, we did.
Q. Now, what part were you going to play in what
you planned on doing at Friendswood?
A. My role in that trip to Friendswood was to
locate a Robert Kaupp.
Q. Now, at that point, did you know whether or
not Robert Kaupp was a suspect or witness to a murder or
someone who didn't know anything at all?
A. At that point, we didn't have any idea what
his role was.
Q. Besides what Nick Thetford had said in his

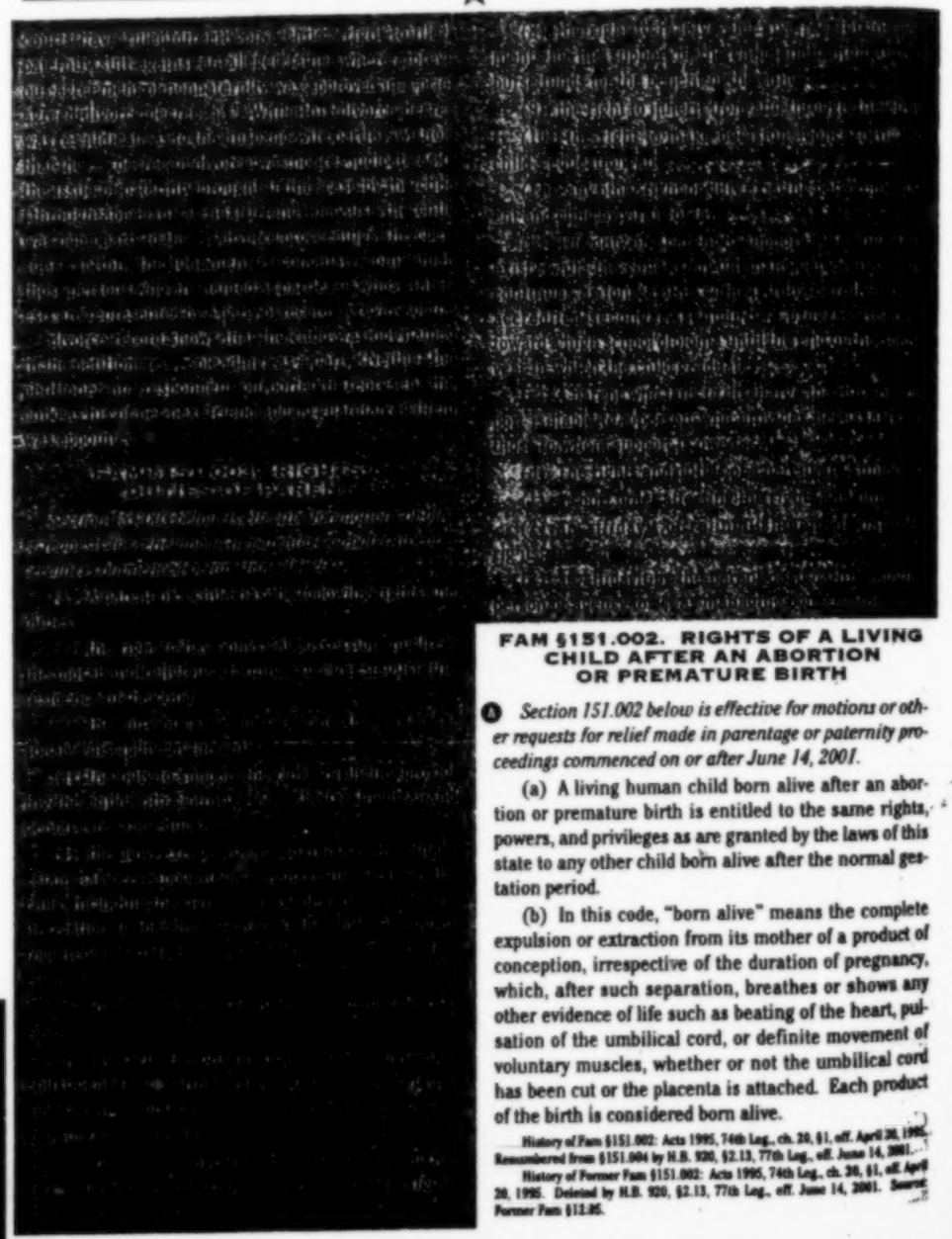
confession, did you have any motive on the part of
Robert Kaupp to believe he would want to harm Destiny
Thetford?
A. No, sir.
Q. Did you have any physical evidence to indicate
he had anything to do with harming Destiny Thetford?
A. No, sir.
Q. Had he told you anything up to that point that
he had anything to do with harming Destiny Thetford?
A. No.
Q. Why did you need to speak to him at that time?
Why didn't you go home and go to sleep?
A. The importance of the case. We had just
developed information from Nicholas Thetford that
Mr. Kaupp had, in fact, been involved. According to
Mr. Thetford, Mr. Kaupp had been involved in the
disappearance of Destiny Thetford.
Q. Had you had crooks in the past tell you that
they did something with somebody else? And is it always
true?
A. No, not always, no.
Q. But is it sometimes true?
A. Sometimes.
Q. Is there any way to know unless you get the
other person?

Appendix 4

PUBLISHER'S NOTE:

Appendix 4 is missing in original document.

Appendix 5



FAM §151.002. RIGHTS OF A LIVING CHILD AFTER AN ABORTION OR PREMATURE BIRTH

A *Section 151.002 below is effective for motions or other requests for relief made in parentage or paternity proceedings commenced on or after June 14, 2001.*

(a) A living human child born alive after an abortion or premature birth is entitled to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive after the normal gestation period.

(b) In this code, "born alive" means the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached. Each product of the birth is considered born alive.

History of Fam §151.002: Acts 1995, 74th Leg., ch. 20, §1, eff. April 20, 1995. Renumbered from §151.004 by H.B. 920, §2.13, 77th Leg., eff. June 14, 2001.
History of Former Fam §151.002: Acts 1995, 74th Leg., ch. 20, §1, eff. April 20, 1995. Deleted by H.B. 920, §2.13, 77th Leg., eff. June 14, 2001. Source: Former Fam §12.05.

FAM §111.002. GUIDELINES SUPERSEDE COURT RULES

(a) The guidelines in this title supersede local court rules and rules of the supreme court that conflict with the guidelines.

(b) Notwithstanding other law, the guidelines may not be repealed or modified by a rule adopted by the supreme court.

History of Fam §111.002: Acts 1995, 74th Leg., ch. 20, §1, eff. April 20, 1995.
Source: Former Fam §§14.032(e), (f), 14.052(c), (d).

FAM §111.003. POSTING GUIDELINES

A copy of the guidelines for possession of and access to a child under Chapter 153 and a copy of the guidelines for the support of a child under Chapter 154 shall be prominently displayed at or near the entrance to the courtroom of every court having jurisdiction of a suit.

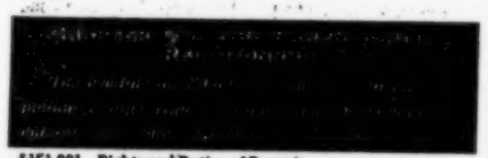
History of Fam §111.003: Acts 1995, 74th Leg., ch. 20, §1, eff. April 20, 1995.
Source: Former Fam §§14.033(p), 14.052.

Chapters 112-150 reserved for expansion

SUBTITLE B. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

CHAPTER 151. RIGHTS & DUTIES IN PARENT-CHILD RELATIONSHIP

A *The heading for Chapter 151 above is effective for motions or other requests for relief made in parentage or paternity proceedings commenced on or after June 14, 2001.*



§151.001 Rights and Duties of Parent
§151.002 Rights of a Living Child After an Abortion or Premature Birth
§151.003 Limitation on State Agency Action

FAM §151.001. RIGHTS & DUTIES OF PARENT

A *Section 151.001 below is effective for motions or other requests for relief made in parentage or paternity proceedings commenced on or after June 14, 2001.*

(a) A parent of a child has the following rights and duties:

(1) the right to have physical possession, to direct the moral and religious training, and to establish the residence of the child;

(2) the duty of care, control, protection, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;

(4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

A (5) except as provided by Section 264.0111, the right to the services and earnings of the child;

(6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;

(7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;

(9) the right to inherit from and through the child;

(10) the right to make decisions concerning the child's education; and

(11) any other right or duty existing between a parent and child by virtue of law.

(b) The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma until the end of the school year in which the child graduates.

(c) A parent who fails to discharge the duty of support is liable to a person who provides necessaries to those to whom support is owed.

(d) The rights and duties of a parent are subject to:

(1) a court order affecting the rights and duties;

(2) an affidavit of relinquishment of parental rights; and

(3) an affidavit by the parent designating another person or agency to act as managing conservator.

voluntary consent to search form.
Q. How did you go about doing ...?
A. We have a form that I carried with me. I presented the form to her. I asked her to read the form. I told her there were specific things I was looking for inside the residence and that I wished for her to sign this form.
Q. Did you tell her why you wanted these items or why you thought they might aid you in your investigation?
A. No.
Q. Did the female sign the form?
A. Yes.
Q. How would you describe the female's attitude while you were there?
A. Well, you know, she appeared real dumbfounded. There are police officers in your house at 3:00 o'clock in the morning. She didn't really understand what was going on.
Q. Aside from that, how would you describe her?
A. She was very courteous and cooperative.
Q. How about the gentleman who answered the door? How would you describe or evaluate his level of cooperation?
A. He was very cooperative and courteous, also.

Q. Were you able to hear what went on in the bedroom?
A. Yes, sir.
Q. What's the first thing you heard in the bedroom?
A. I heard Detective Pinkins say: Robert, we need to talk.
Q. Were those the specific words he used?
A. Yes, as best I can remember.
Q. Did you hear any response from inside the room?
A. Yes.
Q. What did you hear?
A. Okay.
Q. Did you hear any signs of a struggle?
A. No, sir.
Q. Hear any signs of a fight?
A. No, sir.
Q. Ever hear any protestations from the person who answered Pinkins?
A. No, sir.
Q. Did you see the defendant as he was being led ut of his house?
A. I looked over at him, but, you know, I just glanced and took my attention back to

Mr. and Mrs.. I
Q. Did you see the defendant -- or I should say how did the defendant appear to you in terms of his dress and demeanor as he was being led out of his house?
A. When I seen him, I don't remember what he was wearing. He didn't seem too distressed or anything like that.
Q. I want to go back on one point. When you first were let into the Kaupp home, did Mr. Kaupp or the person who answered the door even know whether or not his son was home?
A. I don't recall.
Q. And how long did you stay inside the house after the defendant was led out of the house?
A. Can I make a correction?
Q. Yes.
A. He knew his son was there because he started leading us to the room.
Q. How long did you stay in the Kaupp residence after the defendant was led out?
A. I would say another five to ten minutes.
Q. And what did you do?
A. I was explaining the form and what we were looking for specifically. Ms. Kaupp led me to what I was looking for. At that time, Detective Barnes came in

and requested us to remove some additional items that he thought might be evidence. And he approached Ms. Kaupp and said: I'm going to take these, also. Okay?
And she said okay. At which time, I provided her the names of the detectives that was inside the house and a contact number and told her she could call us if she had any questions.
Q. Did you explain anything further to Ms. Kaupp?
A. No, sir.
Q. In terms of the status of the investigation or the amount of evidence that you have had?
A. I did not, no.
Q. What type of property did you take out of the Kaupp home?
A. I took out -- it was a box of trash bags and inside that box was one trash bag. I believe Detective Barnes took out a pair of tennis shoes and a pair of pants.
MR. WISNER: If I could approach, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Wisner) Sir, let me show you what's marked for identification purposes as State's Exhibit No. 3. What is that?
A. This is a voluntary consent for search and

not struggle with the officer that w[illegible]ndcuffing him while he was in his boxer shorts?
A. Not really, no, sir.
Q. Pardon?
A. No, sir.
Q. I thought you told the jury that meant to you that he went voluntarily?
A. I'm sorry. I presume I misunderstood the question. I was thinking along the lines of handcuffing many people who had resisted.
Q. Well, did the fact that he did not struggle with the arresting officer mean that he went voluntarily, in your opinion?
A. Yes.
Q. I see. So, if he obeys the law and does not resist arrest to you, that means he voluntarily goes down and consents to the arrest?
A. Again, yes.
Q. And that's why you are telling this jury that you thought he consented.
A. He never said he wouldn't go.
Q. Have you heard of the Fifth Amendment, sir?
A. Yes, I have.
Q. That means when a person is confronted by a police officer, he doesn't have to answer questions,

does he?
A. That's correct.
Q. He doesn't have to tell that police officer how to run the police business, does he?
A. No, sir, he doesn't.
Q. In fact, he has a right to sit there and not say anything?
A. Yes.
Q. But you are saying that, because he sat there and didn't say anything, he must have consented?
A. Again, he was detained at that point in time. I wouldn't call it an arrest. He was wanted only to be spoken with.
Q. Well, he was detained, yes?
A. Correct.
Q. He couldn't walk away?
A. No, sir.
Q. So, you are trying to draw, from his silence, an assumption of his guilt or lack -- that he consented because he was silent. That is what you are telling this jury.
A. Please ask that one more time.
Q. You are telling this jury that, because there wasn't a commotion, he must have consented?
A. Yes. He didn't resist. So, yes.

Q. Had t[illegible]ee[illegible] commotion, he would have violated the law[illegible]uld he not?
A. Yes.
Q. You would have called that resisting arrest?
A. Yes.
Q. Had he struggled even harder, he would have violated the law, which would have been a felony called assault on a police officer?
A. Possibly, yes, sir.
Q. Because he followed the law, you are going to say he consented to his confinement?
MR. WISNER: Judge, that's been asked and answered five times.
THE COURT: Overruled.
A. Restate it again, please.
Q. (By Mr. Phillips) Because he followed the law, as any good citizen would do, you are telling this jury that he consented to being hauled out of his house and taken to the police station?
A. Yes.
Q. Now, you also told this jury that the father didn't raise any fuss with us?
A. Correct.
Q. So, are you telling the jury that because the father conceded to the authority of your uniform and the

two police detectives, and did not struggle with them or fight to keep his boy in that home, that he must have consented to have his boy hauled out in handcuffs and in his boxer shorts with no shoes and a T-shirt in the middle of the night?
A. Yes, sir.
Q. And you are further telling this jury that when he was outside and said: Look, take my handcuffs off. I want to go back in this house, you could not have done that because of your instructions and your training and your procedures?
A. We could have taken them off.
Q. But you wouldn't have, would you?
A. No, sir.
Q. I mean, from the moment those handcuffs were on him, he was going down to that police station, wasn't he, unless one of the detectives came to you and said: You don't need to take him down?
A. Yes, sir.
Q. Whether or not he wanted to go or not was not the question?
A. That was the detective's decision, not mine.
Q. But that was the choice they made?
A. I guess so.
Q. And you didn't have a warrant for his arrest

22
and we detain them and put them in cust
Q. You can't enter a house unles know the suspect is there; isn't that true?
A. We can go in their address if it's a listed current address.
Q. And in this instance, you would have gone to the door and knocked on the door first, wouldn't you?
A. Maybe, yes.
Q. When his father came to the door, the head of the household, wiping sleep out of his eyes, you would have told him: We need to talk to your son. Is he here?
A. It wouldn't have been that much talking. He, most likely, would have been brushed aside. We would have immediately hit each room.
Q. Then you would have done what with the defendant had you found him?
A. As far as cuffing him and taking him to the vehicle?
Q. Yes, sir. Exactly the same thing you did with this defendant?
A. No, we didn't.
Q. You wouldn't cuff somebody when you arrest them?
A. You said the same as I did with this

23
individual.
Q. This individual was cuffed in his bedroom; was he not?
A. From what I understood, yes.
Q. He was not allowed to talk to his parents?
A. That's wrong.
Q. Were you present when he had a conversation with his parents?
A. I was present with the parents, but he wasn't not allowed to speak with his parents.
Q. Did you allow him to speak with his parents?
A. He did not ask to speak with his parents.
Q. Did you tell him he could speak with his parents as you were handcuffing him and having the officers drag him out of the house?
A. No, we did not.
Q. But I take it from what you say that he was not even a suspect at that point in time?
A. At that point in time?
Q. Yes, sir.
A. Right.
Q. Let me rewind you back a little bit in time to when you first got involved with all of this going on. Let's kind of go through it a little bit and see where we are. Okay?

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You you really got involved in it around January the .
A. That's when the case was assigned to me.
Q. And you said that, if I remember correctly, you made a determination that Destiny Thetford was having a lot of problems at home, with school, sickness, and with going to the doctor, but not wanting her father to take her to the doctor?
A. Wrong.
Q. Pardon?
A. That's wrong. The last statement was wrong.
Q. Explain to me all of this and why it had significance to you. What was it? What was the problems she was having at home?
A. She was originally reported as a runaway. We needed to interview, basically, everyone in the home, the household. Reading the report that was recorded by the originating officer, she had problems with her brother. Also, she was complaining of an illness.
Q. Let's stop right there. She had what kind of problems with her brother?
A. As far as fighting and maybe sexual encounters.
Q. Well, we have heard, I think, about the sexual encounters. Let's talk about the fighting. That's the

25
first I have heard about that. Tell me about the fighting problems she was having with her brother?
A. From what I understood, they had arguments.
Q. Physical arguments?
A. From what I understood, yes.
Q. And what is that you understood, sir?
MR. WISNER: Judge, I object to this. It's all based on hearsay.
THE COURT: Sustained.
MR. PHILLIPS: Your Honor, we are offering it for the purpose it was used by him in reaching conclusions to which he has testified to the jury. And having reached the conclusion based on this information, we're entitled to test that conclusion.
THE COURT: Are you offering it for his state of mind?
MR. PHILLIPS: For his state of mind and how he reached the conclusion.
THE COURT: That would be overruled.
MR. PHILLIPS: We offer it further to test the conclusion, Your Honor.
THE COURT: You are offering it for his state of mind?
MR. PHILLIPS: No. I offer it to test the conclusion that she was having problems in fighting

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A. Right. That's correct.
Q. Did you tell him: We need to go down to the station?
A. No.
Q. Did you tell him: You need to be handcuffed?
A. No.
Q. Well, he was handcuffed immediately?
A. Yes, he was.
Q. And you saw him handcuffed and he had his boxer shorts. He had no shoes on. He was not dressed for a January night, true?
A. He had on his shorts.
Q. Okay.
A. And he was handcuffed, yes.
Q. But he was not dressed for a January night?
A. I don't know what the temperature was that night, sir.
Q. I see. And you led him handcuffed, in his bed clothes, and took him immediately out of the house?
A. That's correct.
Q. You could have stopped it?
A. That's correct.
Q. You were the officer in charge?
A. One of the officers in charge.
Q. At that point, in that room, you were the

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officer in charge?
A. That's correct.
Q. So, you told the district attorney that you -- if it had been you, you would have let him get dressed. You had the ability to let him get dressed, didn't you?
A. No, no, I didn't.
Q. You couldn't tell that officer to take those handcuffs off of him right now?
A. No.
Q. I see. So, you had started the arrest and you couldn't stop it?
A. We had never started an arrest.
Q. Well then, why couldn't you tell the officer to take those handcuffs off if he was not under arrest?
A. Because they were going to be transporting him and they were the ones who put the cuffs on for their safety purposes.
Q. They didn't have to transfer him right then because you wanted to talk to him there.
A. No, I didn't.
Q. What you wanted to is do these things you told us about in a confession; isn't that true? You wanted surprise. You wanted confusion. You wanted no time to think or reflect. You wanted insecurity. And you wanted a show of police authority. And you got every

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one of those tha t in that house by handcuffing him and rushing him out to the car without even being able to talk to his parents; isn't that true?
A. No.
Q. Well, which one of those things did you not get by your actions that night with seven police officers and five cars parked out in front of his house?
A. I didn't get any of them.
Q. You don't think he was surprised when you burst in on him at 3:00 o'clock in the morning?
A. I don't know.
Q. What would you think?
A. He may have been and may not have been surprised. He had been cooperative. He had been dealing with Detective Barnes on a regular basis.
Q. You don't think he was confused when you yanked him out of a dead sleep, handcuffed him, and had him outside in a patrol car from a secure environment within a matter of minutes?
A. I don't know.
Q. You don't think he was afraid when he had been yanked out of his bed, his parents' house and did not even have the ability to sit and talk with his parents for a few moments or even get dressed?
A. I don't know.

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Q. You don't think that would cause a feeling of insecurity?
A. No, I don't know.
Q. Well, don't you think these five things are counterproductive to what you are telling this jury?
THE COURT: For the record, are you approaching the witness?
MR. PHILLIPS: Yes, Your Honor.
Q. (By Mr. Phillips) When he signed this statement of a person in custody --
A. What was your question?
Q. Do you think these five elements of your tactics in trying to get this statement signed are counterproductive of this statement: I knowingly, intelligently, and voluntarily waive the rights above and make this voluntary statement?
A. Do I think they are counterproductive?
Q. Yeah. Don't you think they conflict a little bit with voluntariness, surprise and confusion?
A. No, sir.
Q. Intelligent decision, surprise, confusion. No conflict?
A. No.
Q. I take it, in your opinion, Nick Thetford was not a credible person?

UNITED STATES CODE ANNOTATED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV--SEARCHES AND SEIZURES

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Current through P.L. 107-185, approved 5-30-02

(except P.L. 107-171)

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CODE ANNOTATED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V--GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY;

SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

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Current through P.L. 107-185, approved 5-30-02

(except P.L. 107-171)

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE ANNOTATED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL

PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS;

PUBLIC DEBT; ENFORCEMENT

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Current through P.L. 107-185, approved 5-30-02

(except P.L. 107-171)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Response Requested

ORIGINAL

No. 02-5636

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 20 2002
CLERK

Robert Justin Kaupp,
Petitioner

v.

The State of Texas,
Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourteenth District of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DEC 24 2002
CLERK
SUPREME COURT, U.S.

28 pp

QUESTION PRESENTED

The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution. (Petition for Writ of Certiorari, pp. i, 3).

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No. 02-5636

SUPREME COURT OF THE UNITED STATES

Robert Justin Kaupp,
Petitioner

v.

The State of Texas,
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On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourteenth District of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the respondent State of Texas, acting by and through the Harris County District Attorney's Office, hereby submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History

Petitoner was charged by indictment with the felony offense of the murder of Destiny Thetford, alleged to have occurred in Harris County, Texas, on or about January 13, 1999. Petitioner was tried on the allegations in the indictment before a jury in the

262nd District Court of Harris County. The jury found petitioner guilty of murder as alleged in the indictment, and thereafter assessed his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of fifty-five (55) years. The trial court thereafter sentenced petitioner and entered judgment in accordance with the jury's verdicts. Petitioner appealed his conviction to the Court of Appeals for the Fourteenth District of Texas sitting at Houston, Texas, hereinafter referred to as the appellate court below. Petitioner's conviction was affirmed by the court below by a unanimous unpublished opinion dated June 7, 2001, a true copy of which appears in Appendix A to the petition for writ of certiorari and may also be found at 2001 WL 619119 (Tex.App.—Houston (14 Dist.)). Petitioner subsequently filed a petition for discretionary review with the Court of Criminal Appeals of Texas. The petition for discretionary review was denied without written opinion by the Court of Criminal Appeals on May 1, 2002. A true copy of the notice from the Court of Criminal Appeals of Texas appears in Appendix B to the petition for writ of certiorari.

Facts

The relevant facts as to the events in question were substantially determined by the trial court from conflicting evidence presented at a hearing on a pretrial motion to suppress evidence filed by petitioner, who thereby sought to suppress his complained of written statement or confession on the theory that it was the product of an illegal arrest. A true copy of the trial court's findings of fact and conclusions of law appears in Appendix C of the petition for writ of certiorari. The facts as expressly or impliedly

found by the trial court were also briefly summarized in the written opinion of the Court of Appeals for the Fourteenth District of Texas, a true copy of which appears in Appendix A of the petition for writ of certiorari and may also be found at 2001 WL 619119 (Tex.App.—Houston (14 Dist.)).[1] No additional relevant facts were presented at the trial of the case. A brief summary of the facts relevant to the question presented for review, prepared from the trial court's findings of fact and conclusions of law and the appellate record of suppression hearing testimony, follows.[2]

---

[1] Standards of appellate review for a trial court's factual determinations in connection with a motion to suppress evidence in Texas are consistent with federal standards. Texas appellate courts generally apply an abuse of discretion standard of review to a trial court's factual determinations giving almost total deference to a trial court's determination of historical facts that the record supports, especially when the trial court's findings are based on an evaluation of credibility and demeanor. The same amount of deference is given to a trial court's determination of mixed questions of law and fact if the resolution of those questions turns on an evaluation of credibility and demeanor. *De novo* review is applied to mixed questions of law and fact, such as probable cause, not turning on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997).

In a hearing on a motion to suppress evidence, the trial judge is the sole trier of fact, judge of the credibility of witnesses, and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990). Texas appellate courts only decide if a trial court's findings of fact are supported by the record, are not at liberty to disturb a trial court's findings of fact that are supported by the record, and address only the question of whether the trial court improperly applied the law to the facts. *Id.*

If a trial court fails to file findings of fact or make a finding on a particular fact, the appellate court will view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its rulings as long as the implied findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000).

[2] There is no joint appendix. Reference to the trial court's findings of fact and conclusions of law appearing in Appendix C of the petition for writ of certiorari will be by (App. C, No. [ ]) for findings of fact and (App. C, Conclusions) for conclusions of law. Reference to the opinion of the Court of Appeals for the Fourteenth District of Texas appearing in Appendix A of the petition for writ of certiorari will be by (App. A, Opinion [page(s)]). Reference to petitioner's petition for discretionary review presented to the Court of Criminal Appeals of Texas appearing in Appendix D of the petition for writ of certiorari will be by (App. D, [page(s)]). Reference to other matters appended to the petition for writ of certiorari will be similar, i.e. (App. [ ]). Reference to the court reporter's record of testimony at the suppression hearing will be by ([Vol.] M.S. [page(s)]).

On January 13, 1999, Destiny Thetford, the complainant, a fourteen-year-old girl, disappeared. Petitioner, among others, was interviewed on that date by Harris County deputy sheriffs, was cooperative, and ostensibly continued to assist in the search for the complainant for the next two weeks. (App. C, No. 1). Petitioner voluntarily went to the Harris County Sheriff's Department Homicide Division offices, hereinafter referred to as the station, with the complainant's father on January 25, 1999. At that time, Petitioner spoke to Detective Barnes and others, gave a voluntary statement, passed a polygraph examination, was informed he passed the polygraph test, and was released. (App. C, No. 2). Petitioner indicated he wanted to help them in trying to find out what happened to the complainant (2 M.S. 11).

The complainant was still missing as of January 26, 1999. Detectives investigating the case learned that the complainant's nineteen-year-old half-brother, Nicholaus Thetford, had a sexual relationship with her. They had reason to believe that Nicholaus Thetford had a motive to harm her because of the sexual relationship, and learned that he had been with petitioner on the day of the complainant's disappearance. (1 M.S. 12-15).

Petitioner and Nicholaus Thetford voluntarily came to the station on January 26, 1999 at the request of Detective Barnes. They were transported there at Barnes' request by Deputy D. L. Gray, after they were handcuffed and placed in the rear of a marked police vehicle. Neither was under arrest at the time. Testimony showed that it was standard procedure for deputies to handcuff persons who were being transported for safety reasons, as the trial court expressly found. (App. C, No. 3; 2 M.S. 16-17). This finding was supported by petitioner's testimony at the suppression hearing as well.

Petitioner admitted, among other things, at the suppression hearing that he had been cooperative with the police from January 13 to January 26, 1999, and that he went around the neighborhood putting up fliers concerning the complainant's disappearance (2 M.S. 179). He acknowledged that he voluntarily went to the station on January 25, 1999 (2 M.S. 180). He acknowledged that he also went to the station on January 26, and said that on that day he was initially handcuffed, but said the handcuffs were removed and he was allowed to wander around the building on his own. (2 M.S. 184). Petitioner was cooperative at that time, gave a second statement clarifying a point as to whether the complainant was at home when he last saw her, and was allowed to leave because he was not considered a serious suspect at the time (1 M.S. 15-17; 2 M.S. 18-19).

Nicholaus Thetford was not allowed to leave the station on January 26, 1999. Thetford ultimately failed three polygraph examinations, and at approximately 1:00 a.m. on January 27, 1999, finalized a written statement admitting among other things that he cut and/or stabbed and killed the complainant, that petitioner participated in the killing, and that they put her body in a drainage ditch or sewer pipe that ran under Thetford's house and opened in a field. The detectives had no other evidence besides Thetford's statement implicating petitioner in the murder. (App. C, No. 4; 1 M.S. 17-20; 2 M.S. 19-20)

Detective Barnes called the Harris County District Attorney's office at approximately 2:00 a.m. on January 27, 1999 seeking an arrest warrant to place petitioner in custody for further questioning. Barnes was told he could not obtain an arrest warrant

for appellant at that time, but was advised to see if petitioner would voluntarily talk with them. (App. C, No. 5; 1 M.S. 67-69; 2 M.S. 21-22).

The investigating detectives then decided to try to get petitioner in and confront him with what Nicholaus Thetford said concerning petitioner's involvement in the crime. (1 M.S. 21-22; 2 M.S. 22). According to the testimony of Detective Pinkins, they did not intend to arrest appellant at that time as they did not have either probable cause to arrest him or a warrant. (1 M.S. 49-51). The detectives then assembled a large group of officers, both in uniform and in plain clothes, for the dual purpose of locating and interviewing petitioner and recovering the complainant's body. (App. C, No. 5).

Detectives Barnes, Pinkins, and Davis, accompanied by uniformed deputies, initially went to the Thetford residence looking for petitioner as Thetford's father thought he might be there. (App. C, Nos. 5 & 6).

After determining petitioner was not at the Thetford residence, investigators, including Detectives Barnes, Pinkins, and Davis, accompanied by uniformed deputies, proceeded to petitioner's residence, while several officers stayed at the Thetford residence and contained the scene. They had not found the complainant's body at that time. (App. C. No. 6; 1 M.S. 24-25). They arrived at petitioner's residence, which was near the Thetford residence, somewhere around 3:00 a.m. on January 27, 1999. (App. C, No. 6). The testimony offered by the State and petitioner as to what occurred after the

investigators arrived at petitioner's residence conflicted, but the conflict was resolved by the express and implied findings of fact made by the trial court.[3]

Petitioner's father, Henry Kaupp, allowed the investigators in his home after Detective Pinkins informed him that they needed to speak to petitioner. Henry Kaupp was not aware if petitioner was there as he sometimes spent the night with friends, and,

---

[3] Petitioner has misstated the facts in this regard. Specifically, the State submits the following factual assertions at pages 2 and 3 of the petition are misstated: (1) "As he [petitioner's father] opened the door, he was asked if his son was at home. When he turned to go to his son's bedroom to see, three officers, two detectives and one uniformed police officer brushed past him and went directly into the Defendant's room."; (2) "Upon entering the [petitioner's] room, the officers shined a flashlight on the Defendant and one of them grabbed the Defendant, pulling him from the bed where he was sleeping and began handcuffing him. While this was going on, one of the officers stated 'We need to talk'. The Defendant responded with one word, 'O.K.'"; (3) "The Defendant remained in the locked car while the police searched the house where he was taken into custody."; (4) "It was generally accepted at the trial, that if the detention of the Defendant was not with the Decedent's [sic] consent, the confession would be inadmissible under the 'fruit of the poisonous tree' doctrine. The Prosecutor maintained that the detention was lawful because the defendant 'consented' to the detention."

Petitioner's incorrect factual assertions are contrary to the facts as found by the trial court, as discussed herein, which were amply supported by the evidence, and are based to some degree on evidence that was specifically or impliedly rejected or discounted by the trial court. Petitioner does not contend that any of the historical facts expressly or impliedly found by the trial court and accepted by the Court of Appeals for the Fourteenth District of Texas as set forth in its opinion were unsupported by the record. Petitioner's factual assertions in his petition are based in part on testimony from petitioner's father, Henry Kaupp, his mother, Tamara Kaupp, and petitioner, that was specifically rejected by the trial court in its findings of fact and conclusions of law because it found the testimony incredible. (App. C, Nos. 8-11).

Moreover, the factual account submitted by petitioner in the petition is devoid of any reference to the prior encounters between the investigating detectives and petitioner and the relationship that developed between them in connection with the investigation of the complainant's disappearance in this case before January 27, 1999, the date of the complained of statement, as pointed out and discussed herein, other than the following terse remark at p. 9 of the petition, "The fact that the Defendant has other conversations at the police station prior to the invasion of his home does not demonstrate that he consented on that occasion." These omitted facts as to the prior encounters and relationship between petitioner and the investigating detectives were clearly relevant as part of the totality of the circumstances of the case that were considered by the trial court and the appellate court below in determining that petitioner voluntarily accompanied the detectives to the station and that petitioner's complained of statement or confession was not the product of an unlawful arrest.

believing petitioner was not criminally responsible for the complainant's disappearance, led the officers to petitioner's bedroom and opened the door for them. (App. C, No. 7). According to the testimony of Detective Pinkins, petitioner woke up when the bedroom door was opened, and Pinkins said, "Robert, its Detective Pinkins. We need to go and talk." (1 M.S. 30). Pinkins testified that petitioner said "okay," and that two uniformed officers immediately went into his room and handcuffed him for safety reasons. (1 M.S. 31). Pinkins testified further that he could have instructed them not to handcuff petitioner, but never did, and indicated that they would have left the residence if petitioner had said he did not want to talk to them or was not going. (1 M.S. 31-32). Pinkins essentially said he believed at the time that petitioner consented to accompany them to the station because he had been very cooperative in the past. (1 M.S. 32). The trial court specifically found in this regard:

> Henry Kaupp led investigators to the Defendant's bedroom and opened the door for investigators. The Defendant was awakened and told by Detective Pinkins that they "needed to talk." The Defendant was unaware at this time that Nicholaus Thetford had confessed and implicated him in this offense. The Defendant replied "Okay," indicating he understood that he was to be questioned again at the Sheriff's Department Lockwood offices. The Defendant was handcuffed by Deputy Calhoun. Calhoun mistakenly believed that the Defendant was under arrest, but this fact was never manifested to the Defendant. Other Sheriff's Department personnel allowed the handcuffing as a safety procedure in transporting a witness under the circumstances.

(App. C, No. 7). The handcuffs were removed at the station prior to the time petitioner was interviewed and gave his statement (1 M.S. 86-87, 99-100). The trial court made no

specific finding as to how petitioner was dressed at the time. Detective Pinkins testified that he thought petitioner had on some shorts and a T-shirt at the time and was later taken some shoes. (1 M.S. 34-35).

Petitoner was not questioned at his residence. En route to the station, petitioner was driven by the Thetford residence where the search for the complainant's body was being conducted so he could see that they were on the verge of discovering the complainant's body. Petitioner was given his Miranda warnings upon arrival at the station. After waiving his rights and agreeing to talk to the detectives further, petitioner was confronted with Nicholaus Thetford's confession and the fact that the complainant's body was found, and thereafter voluntarily gave the investigators the written statement (State's Exhibit 2, or SX-2), of which he now complains, implicating himself in the homicide. (App. C, No. 8).

The trial court found and concluded that petitioner freely and voluntarily gave the statement without coercion, threats, violence, or promises, and that he was not placed under arrest prior to the admissions he made in connection with giving the written statement. (App. C., Conclusions). The motion to suppress evidence was denied.

REASONS FOR DENYING THE PETITION

Lack of Compliance With Supreme Court Rule 14.1(g)(i)

The petition for writ of certiorari does not comply with SUPREME COURT RULE 14.1(g)(i) in that it fails to specify the stage in the proceedings, both in the court of first instance (the trial court) and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which

they were passed on by those courts, including specific reference to the places in the record where the matter appears, so as to show the federal questions were timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Moreover, there are no record references for most facts mentioned in the petition, except for some references at pp. 7-8 of the petition to testimony as to matters that petitioner contends are favorable to his position without any showing that they were accepted or determined to be a fact by any court below. Furthermore, as heretofore pointed out, discussion of relevant facts determined and considered by the courts below as to the prior relationship between petitioner and the investigating officers was substantially omitted by petitioner. The petition should accordingly be denied for failure to comply with Supreme Court Rule 14.1(g)(i). *See Adams v. Roberston*, 520 U.S. 83, 89 n. 3 (1997)(observing in holding certiorari improvidently granted that petitioners failed to comply with Rule 14.1(g)(i) by providing specific record references).

Petitioner's Question Presented for Review Is Inconsistent With The Contentions He Raised In The Appellate Court Below

The question presented for review by petitioner, who has been represented by the same attorney at all stages of litigation in the instant case, is inconsistent with his contentions presented to the trial court and the appellate court below. Petitioner presents the following question for review in this Court:

> The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution. (Petition for Writ of Certiorari, pp. i, 3).

As to the first part of petitioner's question presented for review to this Court, petitioner did not contend in the appellate court below either that "[t]he illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant" or that "The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause." [4] It is unclear from the wording of the question presented for review exactly what federal question(s) petitioner contends should be reviewed by the Court.

[4] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The concept of waiver is distinctly different from that of consent in the context of a search or an encounter, and is ordinarily not used in analyzing whether conduct is consensual in the context of an encounter with the police. Based on a mistaken reading of cases involving consent searches, petitioner incorrectly asserted in both the appellate court below and the Court of Criminal Appeals of Texas (App. D, p. 5) that, under the Fourth Amendment, the State had the burden to prove by clear and convincing evidence that petitioner's consent to accompany the officers to the station was freely and voluntarily given. It is not clear that standards applicable to consent in the context of searches apply to seizure issues concerning whether police/citizen encounters are consensual. It will be assumed that they apply for the purpose of this brief. As will be later shown, the correct standard of proof in connection with the State's burden of proof in connection with consent to search issues under the Fourth Amendment is preponderance of the evidence, which is generally applied in suppression hearings. The fact that petitioner asserted an incorrect standard of review in this regard in his petition for discretionary review to the Court of Criminal Appeals of Texas may have been viewed by that court to be a sufficient reason to deny his petition.

The relevant question from among those petitioner presented for review in the appellate court below was embodied in his point of error number one, as follows: "The trial court erred in overruling the motion to suppress and in allowing the defendant's confession into evidence, because the confession was the result of an illegal arrest and inadmissible under the constitution of the United States and the State of Texas and the laws of the State of Texas." (Appellant's Brief, p. 2). This was the question addressed and decided by the appellate court below (App. A, Opinion, p. 1), which upheld the trial court's finding that petitioner freely and voluntarily accompanied the investigating officers to the station for questioning and was not arrested or in custody before he made incriminating remarks in connection with giving his statement.

Consequently, as nothing exceptional is presented by the instant case, the petition for a writ of certiorari should be denied as this Court does not ordinarily decide questions not raised or involved in the lower court. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980). *See also Adams v. Robertson*, 520 U.S. 83, 87-90 (1997)(holding question presented would not be reviewed where petitioner failed to meet burden to show it was properly presented to court below).

Petitioner's Contention Was Not Decided by The Highest State Court Because It Was Not Properly Presented

Petitioner's contention as presented to the Court of Criminal Appeals of Texas, the highest Texas court in which a decision could have been had, in his petition for

discretionary review was similar to the question presented for review to this Court, namely:

> The appellate court erred in overruling appellant's first point of error and in holding that the simple statement of "OK" was a knowing and intelligent waiver of the appellant's right not to be handcuffed and transported to the police station for the purpose of securing a statement from him by way of a confession. The confession was the result of an illegal detention in custody and inadmissible under the constitution of the United States and the State of Texas and the laws of the State of Texas.

(App. D, pp. 2, 3). Petitioner's contention as presented to the Court of Criminal Appeals of Texas differed from that he raised in the appellate court below, as was heretofore pointed out, and for that reason may well have caused the Court of Criminal Appeals of Texas to deny his petition for discretionary review, at least as to that issue, on the basis of state procedural grounds or state procedural default, an independent state ground for the decision. *See Fox v. State*, 930 S.W.2d 607 (Tex.Crim.App. 1996)("This Court reviews 'decisions' of the courts of appeals; as a general rule, we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court.").

Petitioner has not met his burden to show the contrary. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987)(holding issue not properly presented to state courts, in accordance with general rule that where highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the contrary is shown by the aggrieved party); SUPREME COURT RULE 14.1(g)(i)(placing burden of

demonstrating proper presentation of federal questions sought to be reviewed on petitioner).

Consequently, a writ of certiorari should be denied because petitioner did not properly present the question actually decided by the appellate court below to the Court of Criminal Appeals of Texas, and the case was accordingly not decided by the highest Texas court that could have addressed the issue. *See* 28 U.S.C. § 1257 (allowing review by way of writ of certiorari of decision of highest state court in which decision could be had); *Adams v. Robertson*, 520 U.S. 83, 87-90 (1997)(holding question presented would not be reviewed where petitioner failed to meet burden to show it was properly presented to court below); *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963)(holding certiorari improvidently granted where state procedural default led to determination that appellate court deciding case was not highest state court from which a decision could be had within the meaning of 28 U.S.C. §1257).

The Case Was Properly Decided Under Correct Legal Standards by the Appellate Court Below

Respondent's position in the courts below and in this Court is that, based on the totality of the circumstances, petitioner voluntarily consented to accompany the law enforcement officers to the station and was not arrested, in custody, and detained until after he made his incriminatory admissions in connection with making the statement of which he complains. Accordingly, his confession was not the product of or tainted by an illegal arrest in violation of the Fourth and Fourteenth Amendments. The Court of Appeals for the Fourteenth District of Texas agreed with respondent's position in this

regard, finding no error in the trial court's findings of fact and conclusions of law to the effect that petitioner "[w]as not placed under arrest prior to his admission that he was involved in the complainant's disappearance." (App. A, Opinion, pp. 3-4). The decision of the appellate court below was correctly decided under the law and the facts for the following reasons.

As to the second part of petitioner's question presented for review to this Court, essentially whether the Texas courts applied the correct test "to determine if there was a waiver of constitutional rights under the United States Constitution," petitioner contends that the appellate court below used an improper test to determine consent by viewing the evidence presented at the suppression hearing in the light most favorable to the trial court's ruling (Petition for Writ of Certiorari, p. 9).[5] Petitioner contends that the court below instead should have required "[t]hat the evidence be 'clear and convincing' and not based on speculation" as to petitioner's consent to accompany the officers to the station. Petitioner asserts in that regard:

> Had the Court of Appeals applied the proper test concerning the consent of the Defendant for to [sic] the sudden detention by the officers, the conviction of the Defendant would have been reversed and a new trial ordered. Their failure to follow the applicable constitutional law deprived the defendant of his constitutional rights and entitles him to have this court [sic] correct the error committed.

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[5] The appellate court below stated only: "We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling." (App. A, Opinion, p. 3). The court below correctly applied this standard to the extent it did because it is merely part of customary appellate standards of review as to suppression rulings by a trial court. *See, supra*, n. 1. Petitioner incorrectly asserts at p. 9 of the petition that the appellate court below indicated that it used this test to determine consent.

(Petition for Writ of Certiorari, p. 10).[6]

Based on the foregoing assertions by petitioner, his question presented for review should accordingly be reframed essentially as follows: Did the court below apply an improper test or standard of review for determining petitioner's consent to accompany the officers to the station for questioning under the Fourth Amendment where it did not determine whether the State met its burden to show petitioner's consent by clear and convincing evidence?

Assuming that specific proof of consent is required in circumstances such as those presented by the instant case, petitioner asserts an incorrect test or standard for review for determining consent under the Fourth Amendment, and has asserted the same incorrect test or standard of review throughout this litigation (*See* App. D, p. 5, where petitioner asserted in his petition for discretionary review to the Court of Criminal Appeals of Texas that the clear and convincing standard of proof was required by the Fourth Amendment).

The correct test that was actually applied by the appellate court below to determine whether petitioner's encounter with law enforcement authorities in the instant case was consensual under the circumstances presented was that set out in *Florida v. Bostick*, 501 U.S. 429, 434, 439 (1991), namely whether a reasonable person would feel free to disregard the police and go about his business, which is determined by looking at the totality of the circumstances. (*See* App. A, Opinion, p. 4-7). This standard does not

[6] Petitioner cites no meaningful authority for the proposition that clear and convincing proof is required by the Fourth Amendment. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986), cited at p. 10 of the petition, addressed waiver of the Sixth Amendment right to counsel, and did not establish a requirement for clear and convincing proof. *See, infra*, n. 7.

necessarily require, as an element, specific proof of an individual's consent, but assuming that specific proof of consent is required by the Fourth Amendment, the burden of proof placed on the prosecution would in any event be no more than a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n. 14 (1974)(holding controlling burden of proof at suppression hearing involving question of consent to search under Fourth Amendment was no greater than by a preponderance of the evidence).[7]

The appellate court below correctly decided the case under appropriate legal standards. The court began its analysis of the situation presented with reference to the test for determining whether a person was in custody, namely, "[i]f under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." (App. A, Opinion, p. 4). *See*

[7] Petitioner's mistaken assertion at pp. 6 & 10 of the petition that the clear and convincing evidence standard is applicable to consent searches or other determinations of consent under the Fourth Amendment may have resulted from the fact that the Court of Criminal Appeals of Texas has applied that degree of proof to the prosecution's burden of proof in connection with consent to search issues arising under Article I, Section 9 of the Texas Constitution. *See Maxwell v. State*, 73 S.W.3d 278, 281 (Tex.Crim.App. 2002)("The federal constitution requires the state to prove the validity of the consent by a preponderance of the evidence; the Texas Constitution requires the state to show by clear and convincing evidence that the consent was valid.").

Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968), relied on by petitioner for the clear and convincing proposition at p. 6 of the petition, which presented the question of voluntariness of consent to search a private residence given only after an officer asserted that he possessed a warrant, held only that a prosecutor has the burden of proving that consent to justify the lawfulness of a search was freely and voluntarily given, and that a showing of only mere acquiescence to a claim of lawful authority was insufficient. *Bumper* did not hold that proof by clear and convincing evidence, as opposed to proof by a preponderance of the evidence, was required in cases involving consent. That issue was subsequently addressed and resolved in favor of the preponderance of the evidence standard in *Matlock*. Consequently, if proof of consent is required in this regard under the Fourth Amendment, the burden of proof is by no

Stansbury v. California, 511 U.S. 318, 322 (1994), and cases cited therein. The court considered all of the relevant circumstances of the case as found by the trial court as to events occurring prior to petitioner's encounter with the investigating detectives on the morning of January 27, including specifically the following:

> appellant had met Detective Pinkins previously in connection with the investigation into the complainant's disappearance;
>
> on at least two previous occasions, appellant voluntarily went to the sheriff's department to answer questions and take a polygraph examination in connection with the investigation;
>
> on both prior occasions, appellant was allowed to leave the sheriff's department and was given no reason to believe that he was a suspect in the investigation;
>
> on one of those occasions, appellant had been placed in handcuffs before being transported in a patrol car, and the handcuffs were removed once appellant arrived at the station;
>
> appellant had never been questioned in connection with the investigation at any location other than the sheriff's deparment.

(App. A, Opinion, p. 5).[8] As heretofore noted, reference to or discussion of these facts showing the prior relationship between petitioner and the investigating detectives during the course of the investigation was substantially omitted in the petition.

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more than a preponderance of the evidence in any event. Petitioner has not contended that the evidence presented was not sufficient to meet the preponderance of the evidence standard.

[8] The fact that the testimony showed that it was standard procedure for the Harris County Sheriff's Department to handcuff persons being transported, and that petitioner was in fact handcuffed previously in connection with being transported and was on the occasion in question, but that the handcuffs were removed prior to questioning on each occasion, was properly viewed by the appellate court below and taken into account as merely a circumstance to be considered in determining whether petitioner was in custody. *See Rhodes v. State*, 945 S.W.2d 115, 117-18 (Tex.Crim.App. 1997)(holding handcuffing merely a circumstance in determining whether an

The appellate court below went on to find no evidence of any express or implied threats that petitioner would be forcibly taken to the station on the occasion in question for questioning, and concluded based on the trial court's determination of the historical facts and the totality of the circumstances "[t]hat a reasonable person in appellant's situation would have felt free to say 'no' or otherwise to disregard Detective Pinkins and go about his business. Instead, by saying 'Okay,' appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning." (App. A, Opinion, p. 6)(citation omitted). The appellate court below determined all that was required by the Fourth Amendment in any event. In doing so, the appellate court below recognized that the case "[m]ust be narrowly construed based on the unique facts presented," and expressed no opinion on situations where "[t]he individual had no previous interaction with the police department and its investigative procedures." (App. A, Opinion, p. 7, n. 4).

The appellate court below clearly applied the appropriate legal standards for evaluating the situation presented and the consensual nature of petitioner's encounter

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arrest has taken place), and cases cited therein. Handcuffing for safety reasons is not per se unreasonable. *Id.* The prior event showed petitioner's knowledge of the safety procedure and the fact that its application to him was not indicative of an arrest under the circumstances. The appellate court below expressly found based on the circumstances "[t]hat a reasonable person in appellant's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement. Furthermore, appellant did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation with the law enforcement officers transporting him." (App. A, Opinion, pp. 6-7). The fact that questioning occurred at the station was simply a circumstance to be considered and was not dispositive on the question of custody. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983)(holding stationhouse questioning does not in and of itself show custody). Likewise, the time of the encounter is not controlling and is but a factor to consider. There is no constitutional requirement prohibiting the police from contacting a person at any particular time.

under the Fourth Amendment as dictated by *Stansbury v. California*, *Florida v. Bostick*, and *United States v. Matlock*, *supra*. Petitioner's contention that said court applied an incorrect test or legal standard for determining consent contrary to the requirements of the Fourth Amendment is patently without merit.

Review Is Sought of a Decision Turning Upon
An Analysis of the Particular Facts Involved

As heretofore shown, the instant case was decided primarily upon the basis of the unique factual situation presented to the courts below. As heretofore stated, petitioner does not contend any facts found have no basis in the record. The appellate court below concurred in the factual determinations made by the trial court. No showing of any obvious or exceptional error in that regard has been shown by petitioner. *See United States v. Doe*, 465 U.S. 605, 614 (1984)("Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred.").

All facts found by the trial court had evidentiary support. The case is simply too fact-bound to merit consideration of this Court. Few, if any, other litigants would be affected by a decision in this case in any event. Neither an important federal question nor anything of substantial importance to the jurisprudence as a whole is presented. See SUPREME COURT RULE 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

No Conflicting Decisions or Unsettled Questions

Petitioner has failed to demonstrate that the decision of the appellate court below conflicts with any decisions from this Court or any other on an important question of federal law within the meaning of SUPREME COURT RULES 10(a)-(c). A principal purpose for the exercise of certiorari jurisdiction is resolution of conflicts among federal appellate courts and state courts as to the meaning of provisions of federal law. *See Braxton v. United States*, 500 U.S. 344, 347 (1991). The cases cited by petitioner, many of which are inapplicable to the situation presented, state only general principles of law. Petitioner supplies no argument as to how the cited cases conflict with the decision of the appellate court below as to any important question of federal law.

Moreover, petitioner has neither asserted nor demonstrated that the appellate court below decided an important question of federal law that has not been, but should be, settled by this Court within the meaning of SUPREME COURT RULE 10(c). Consequently, certiorari should be denied.

CONCLUSION

It is respectfully submitted based on the foregoing reasons that the petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served upon the petitioner's attorney at the following address on the date of filing same by first class United States mail, certified return receipt requested, with postage prepaid and affixed thereto:

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SUPREME COURT OF THE UNITED STATES

ROBERT KAUPP *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

No. 02–5636. Decided May 5, 2003

PER CURIAM.

This case turns on the Fourth Amendment rule that a confession "obtained by exploitation of an illegal arrest" may not be used against a criminal defendant. *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975). After a 14-year-old girl disappeared in January 1999, the Harris County Sheriff's Department learned she had had a sexual relationship with her 19-year-old half brother, who had been in the company of petitioner Robert Kaupp, then 17 years old, on the day of the girl's disappearance. On January 26th, deputy sheriffs questioned the brother and Kaupp at headquarters; Kaupp was cooperative and was permitted to leave, but the brother failed a polygraph examination (his third such failure). Eventually he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch. He implicated Kaupp in the crime.

Detectives immediately tried but failed to obtain a warrant to question Kaupp.[1] Detective Gregory Pinkins

[1]The detectives applied to the district attorney's office for a "pocket warrant," which they described as authority to take Kaupp into custody for questioning. App. 3 to App. D to Pet. for Cert. 6 (trial transcript). The detectives did not seek a conventional arrest warrant, as they did not believe they had probable cause for Kaupp's arrest. See *ibid.* As the trial court later explained, the detectives had no evidence or motive to corroborate the brother's allegations of Kaupp's involvement, see App. C to Pet. for Cert. 2; the brother had previously failed three polygraph examinations, while, only two days earlier, Kaupp had voluntarily taken and passed one, in which he denied his involvement, see *id.*, at 1–2.

nevertheless decided (in his words) to "get [Kaupp] in and confront him with what [the brother] had said." App. A to Pet. for Cert. 2. In the company of two other plain clothes detectives and three uniformed officers, Pinkins went to Kaupp's house at approximately 3 a.m. on January 27th. After Kaupp's father let them in, Pinkins, with at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, "'we need to go and talk.'" *Ibid.* Kaupp said "'Okay.'" *Ibid.* The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. The state points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers.

They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting Kaupp with the brother's confession, and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Kaupp first denied any involvement in the victim's disappearance, but 10 or 15 minutes into the interrogation, told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to murder, for which he was later indicted.

After moving unsuccessfully to suppress his confession as the fruit of an illegal arrest, Kaupp was convicted and sentenced to 55 years' imprisonment. The State Court of Appeals affirmed the conviction by unpublished opinion, concluding that no arrest had occurred until after the confession. The state court said that Kaupp consented to go with the officers when he answered "'Okay'" to Pinkins's statement that "'we need to go and talk.'" App. A to Pet. for Cert. 2, 6. The court saw no contrary significance in the subsequent handcuffing and removal to the

patrol car, given the practice of the sheriff's department in "routinely" using handcuffs for safety purposes when transporting individuals, as officers had done with Kaupp only the day before. *Id.*, at 6. The court observed that "a reasonable person in [Kaupp's] position would not believe that being put in handcuffs was a significant restriction on his freedom of movement." *Ibid.* Finally, the state court noted that Kaupp "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation." *Id.*, at 6–7. Kaupp appealed, but the Court of Criminal Appeals of Texas denied discretionary review. App. B to Pet. for Cert. We grant the motion for leave to proceed *in forma pauperis*, grant the petition for certiorari, and vacate the judgment below.

A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida* v. *Bostick*, 501 U. S. 429, 437 (1991) (quoting *Michigan* v. *Chesternut*, 486 U. S. 567, 569 (1988)). This test is derived from Justice Stewart's opinion in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), see *California* v. *Hodari D.*, 499 U. S. 621, 627–628 (1991), which gave several "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, *supra*, at 554.

Although certain seizures may be justified on something less than probable cause, see, *e.g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968), we have never "sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization." *Hayes* v. *Florida*, 470 U. S. 811, 815 (1985)[2]; cf. *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980); compare *Florida* v. *Royer*, 460 U. S. 491, 499 (1983) (plurality opinion) ("[The police] may [not] seek to verify [mere] suspicions by means that approach the conditions of arrest"), with *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) ("[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause" (quoting *Terry*, *supra*, at 30)). Such involuntary transport to a police station for questioning is "sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Hayes*, *supra*, at 816.

The state does not claim to have had probable cause here, and a straightforward application of the test just mentioned shows beyond cavil that Kaupp was arrested within the meaning of the Fourth Amendment, there being evidence of every one of the probative circumstances mentioned by Justice Stewart in *Mendenhall*.[3] A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." He was taken out in handcuffs,

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[2]We have, however, left open the possibility that, "under circumscribed procedures," a court might validly authorize a seizure on less than probable cause when the object is fingerprinting. *Hayes*, 470 U. S., at 817.

[3]On the record before us, it is possible to debate whether the law enforcement officers were armed. The State Court of Appeals not only described them as armed but said specifically that Pinkins's weapon was visible, though not drawn, when he confronted Kaupp in the bedroom. See App. A to Pet. for Cert. 6. But at least one officer testified before the trial court that they went to Kaupp's house unarmed. See App. 3 to App. D to Pet. for Cert. 8 (trial transcript).

without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. This evidence points to arrest even more starkly than the facts in *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979), where the petitioner "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." There we held it clear that the detention was "in important respects indistinguishable from a traditional arrest" and therefore required probable cause or judicial authorization to be legal. *Ibid.* The same is, if anything, even clearer here.

Contrary reasons mentioned by the state courts are no answer to the facts. Kaupp's "'Okay'" in response to Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "we need to go and talk" presents no option but "to go." There is no reason to think Kaupp's answer was anything more than "a mere submission to a claim of lawful authority." *Royer*, *supra*, at 497 (plurality opinion); see also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226, 233–234 (1973). If reasonable doubt were possible on this point, the ensuing events would resolve it: removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters. Even "an initially consensual encounter . . . can be transformed into a seizure or detention within the meaning of the Fourth Amendment." *INS* v. *Delgado*, 466 U. S. 210, 215 (1984); see *Hayes*, *supra*, at 815–816 ("[A]t some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection

of the Fourth and Fourteenth Amendments"). It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.

Nor is it significant, as the state court thought, that the sheriff's department "routinely" transported individuals, including Kaupp on one prior occasion, while handcuffed for safety of the officers, or that Kaupp "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation." App. A to Pet. for Cert. 6. The test is an objective one, see, *e.g.*, *Chesternut*, 486 U. S., at 574, and stressing the officers' motivation of self-protection does not speak to how their actions would reasonably be understood. As for the lack of resistance, failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer.

Since Kaupp was arrested before he was questioned, and because the state does not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was "an act of free will [sufficient] to purge the primary taint of the unlawful invasion." *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963). Demonstrating such purgation is, of course, a function of circumstantial evidence, with the burden of persuasion on the state. See *Brown*, 422 U. S., at 604. Relevant considerations include observance of *Miranda*, "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." 422 U. S., at 603–604 (footnotes and citation omitted).

The record before us shows that only one of these consid-

erations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U. S., at 603 (emphasis in original); see also *Taylor* v. *Alabama*, 457 U. S. 687, 699 (1982) (O'CONNOR, J., dissenting) (noting that, although *Miranda* warnings are an important factor, "they are, standing alone, insufficient"). All other factors point the opposite way. There is no indication from the record that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation. In the interim, he remained in his partially clothed state in the physical custody of a number of officers, some of whom, at least, were conscious that they lacked probable cause to arrest. See *Brown*, *supra*, at 604–605. In fact, the state has not even alleged "any meaningful intervening event" between the illegal arrest and Kaupp's confession. *Taylor*, *supra*, at 691. Unless, on remand, the state can point to testimony undisclosed on the record before us, and weighty enough to carry the state's burden despite the clear force of the evidence shown here, the confession must be suppressed.

The judgment of the State Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.